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v.
State Bar of Nevada

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Court: Supreme Court of Nevada

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Counsel for respondent: Howe, John E., Genego, William J.,
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Entry	Date	Note	Proceedings and Orders
1	May 22 1990	G	Petition for writ of certiorari filed.
2	May 22 1990		Brief amicus curiae of Natl. Association of Criminal Defense Lawyers filed.
4	Jun 8 1990		Order extending time to file response to petition until July 20, 1990.
5	Jul 17 1990		Brief of respondent State Bar of Nevada in opposition filed.
6	Jul 18 1990		DISTRIBUTED. Sep. 24, 1990.
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8	Nov 30 1990		Brief amicus curiae of United States filed.
9	Dec 5 1990		DISTRIBUTED. January 4, 1991
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14	Feb 20 1991		Brief amicus curiae of Nevada Attorneys for Criminal Justice filed.
12	Feb 21 1991		Joint appendix filed.
13	Feb 21 1991		Brief of petitioner Dominic P. Gentile filed.
15	Feb 21 1991		Brief amici curiae of American Newspaper Publishers Assn., et al. filed.
16	Feb 21 1991		Brief amicus curiae of Natl. Association of Criminal Defense Lawyers filed.
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22	Mar 25 1991	X	Brief amicus curiae of United States filed.
23	Mar 25 1991	X	Brief of respondent State Bar of Nevada filed.
24	Mar 25 1991	X	Brief amicus curiae of American Bar Association filed.
25	Apr 8 1991	X	Reply brief of petitioner Gentile filed.
26	Apr 15 1991		ARGUED.

89 - 1836

No. 90—

Supreme Court, U.S.

FILED

MAY 22 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

DOMINIC P. GENTILE,
Petitioner,

v.

STATE BAR OF NEVADA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment's speech and press clauses limit the power of a state to punish a lawyer who holds a press conference decrying criminal charges against his client as based upon police and prosecutorial misconduct, when there is no record evidence that the conference could or did interfere with the impartial administration of justice.

2. Whether, and if so under what circumstances, speech about public officials' behavior on an issue of public concern may be forbidden because the lawyer is counsel in pending litigation involving those officials and issues.

3. Whether a state Supreme Court Rule forbidding lawyer extrajudicial statements having a "substantial likelihood of materially prejudicing an adjudicative proceeding," and decreeing that publicly expressing "any opinion as to the guilt or innocence of a defendant" or the "credibility of a . . . witness" is "ordinarily . . . likely" to have such an effect is impermissibly vague and overbroad under the First Amendment and the due process clause?

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IN THE
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OCTOBER TERM, 1989

No. 90-

DOMINIC P. GENTILE,
v. *Petitioner,*
STATE BAR OF NEVADA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA**

OPINIONS BELOW

The opinion of the Nevada Supreme Court, addressing and rejecting Gentile's federal constitutional challenges, is reported as *Gentile v. State Bar of Nevada*, 789 P.2d 386 (1990).

JURISDICTION OF THIS COURT

The judgment below was entered and filed on February 21, 1990. This Court has jurisdiction to issue the writ of certiorari under 28 U.S.C. § 1257, because petitioner raised and preserved, and the highest court of the state specifically rejected, a constitutional claim.

CONSTITUTIONAL AND RULE PROVISIONS AT ISSUE

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right to the people peaceably to

assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

In pertinent part, the Nevada Supreme Court Rule 177 states:

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to . . . a criminal matter . . . and the statement relates to:

- a. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
 - c. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
 - d. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that would result in incarceration;
 - e. information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial;
3. Notwithstanding subsection 1 and 2 (a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
- a. the general nature of the claim or defense;
 - b. the information contained in a public record;
 - c. that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim of defense involved and, except when prohibited by law, the identity of the persons involved;
 - g. in a criminal case:
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

STATEMENT OF FACTS

Dominic Gentile is a Nevada attorney with a national reputation as advocate, lecturer, author and leader in bar groups. The Nevada Supreme Court affirmed a private reprimand of Gentile "based on comments he made at a press conference regarding a pending criminal matter at which he represented the accused." (Appendix, at 2a) [hereinafter cited as App.]. Mr. Gentile's client, Grady Sanders, was arraigned on February 5, 1988, on charges of larceny, racketeering and narcotics trafficking. In substance, Grady Sanders was charged with stealing money and drugs from a safety deposit box used by Las Vegas police to store such material. The charges followed a highly-publicized, year-long investigation, during which Sanders' alleged involvement was the subject of dozens of newspaper articles and radio and television news stories. The Las Vegas Metro Police Department was the source of many of these stories.

Mr. Gentile held the press conference on arraignment day, February 5, 1988. He decried the police and press coverage, said that Mr. Sanders was innocent, and suggested that a police officer was in fact the guilty party. Mr. Gentile was aware that the scheduled trial date was over five months in the future. During the conference he indicated that he examined applicable ethics rules in preparation for it and refused to answer a question regarding the credibility of witnesses on ethical grounds. App. 11a.

Sanders' trial did not begin until August 11, 1988. Sanders was acquitted of all charges. The State Bar filed its formal complaint against Mr. Gentile on December 6, 1988, charging a violation of Nevada Supreme Court Rule 177. So far as this record reveals, the police officers and other public officials who fueled the press barrage of 1987 were not disciplined. The prosecutor in the Sanders case was present at a pre-indictment press conference given by the police commander wherein he asserted that his Metro officers had passed a polygraph about the theft and

that the employees of the storage facility had declined such tests. Mr. Sanders was the manager of the storage facility.

Public concern with the Sanders case was high because a large amount of narcotics and travellers' cheques had disappeared from the storage facility used by Las Vegas police as part of a "sting" operation. The media and the public were interested to know whether police officers were involved in the thefts, or whether Mr. Sanders or others were responsible.

At the press conference, Mr. Gentile generally set out his theory of the case and the evidence he expected to develop at trial. App. 6a-16a. His statements would all have been fair argument to a jury. Moreover, extensive *voir dire* concerning pre-trial publicity was conducted of prospective jurors and an impartial jury was empaneled.

Mr. Gentile responded to the Bar complaint, denying that he had violated Rule 177, and raising in briefs and argument the very constitutional issues presented here. Bar counsel's proof consisted entirely of four exhibits: the complaint, a videotape of Mr. Gentile's press conference, and two letters authored by Mr. Gentile. The Southern Nevada Disciplinary Board recommended that Mr. Gentile be given a private reprimand. In affirming, the Nevada Supreme Court made no specific reference to statements at the press conference but concluded generally that:

The fact that these comments were timed to have maximum impact and related to the character, credibility, reputation or criminal record of the . . . potential witnesses establishes by clear and convincing evidence the substantial likelihood of material prejudice to the adjudication of the accused's criminal proceeding.

App. 4a.

Although the Nevada Supreme Court found no actual prejudice to the fairness of the trial as a result of Mr.

Gentile's remarks, it affirmed the Board's finding of a violation, and expressly rejected the constitutional challenges presented here. (App. 4a).

ARGUMENT

I. REGULATION OF LAWYER SPEECH ABOUT PENDING LITIGATION RAISES FUNDAMENTAL AND UNRESOLVED ISSUES UNDER THE FIRST AMENDMENT.

This case involves speech about a public official's alleged criminality, a matter of public concern, at a time of intense media interest. It squarely presents the fundamental and recurring issue of how courts are to resolve potential conflicts between "free speech and fair trials [,] two of the most cherished policies of our civilization." *Bridges v. California*, 314 U.S. 252, 260 (1941).

This Court has previously liberated the media, *e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), public officials, *e.g.*, *Wood v. Georgia*, 370 U.S. 375 (1962), and interested onlookers, *Bridges v. California*, 314 U.S. 252 (1941), from punishment for speaking out on pending cases, absent proof of clear and present danger to the administration of justice. *Compare Cox v. Louisiana*, 379 U.S. 559 (1965) (constitutional guidelines for picketing near a courthouse). Recently, this Court held that a grand jury witness may not be restrained indefinitely from truthful reports of his own testimony. *Butterworth v. Smith*, 110 S. Ct. 1376 (1990).

This Court has never directly addressed whether the First Amendment places limits on the regulation or punishment of attorneys for speech related to pending cases.¹

¹ In *Re Sawyer*, 360 U.S. 622 (1959), this Court reversed a disciplinary action taken against a defense attorney for speech related to a pending trial, but the Court declined to "reach or intimate any conclusion on the constitutional issues presented." *Id.* at 627. Likewise, in *Re Snyder*, 472 U.S. 634 (1985), this Court confronted a

The Court has nonetheless constitutionalized the law of lawyer advertising, overturning various state bar and supreme court ethical restrictions. *E.g.*, *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Re R.M.J.*, 455 U.S. 191 (1982); *Re Primus*, 436 U.S. 412 (1978).

This Court has never, however, spoken about the increasingly vexing problem of lawyer speech about matters of public concern in which the speaker is counsel of record. The problem is pandemic: One need only pick up the newspaper or turn on the radio or television to see it. Moreover, heightened public interest in our system of criminal justice has fostered evolving accommodations between legitimate fair trial and free press concerns, as evidenced by the introduction of television into the courtroom.

The spectre of juries swayed by the media, however, stalks the corridors of our courts.² Lawyer speech designed to put inadmissible evidence before a panel of jurors, and which poses an imminent danger of subverting the course of justice, is the proper concern of the bench and bar.

But lawyers who dwell in the courthouses are sometimes the most valuable public witnesses to what is going on there. James Otis argued the writs of assistance cases: Do we in retrospect wish he had been punished for speaking outside the court about the iniquity within? *See generally*, J. Quincy, Report of Cases Argued and Adjudged

First Amendment claim by counsel concerning speech directed at a federal court, but declined to reach the constitutional issue. *Id.* at 643.

² A presumption of prejudice from disseminated public remarks may well be overstated, as, for example, one Texas federal court has observed: "as a general rule, 'ordinary readers' in these parts are fortunately tolerant and skeptical." *Sweeney v. Caller-Times Pub. Co.*, 41 F. Supp. 163 (S.D. Tex. 1941).

in the Supreme Courts of Judicature of the Province of Massachusetts Bay 51-57, 469-82 (1865). As this Court has acknowledged, "It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (Burger, C.J.)

This case should be heard because it will permit the Court to draw intelligible lines governing this clash of equally vital constitutional values. It presents a reputable lawyer, who studied the disciplinary rules before he spoke, App. at 11a, and whose client had already been subjected to public obloquy by police comments reported in the press. At the time of his comments he was aware that trial was scheduled to take place more than five months away, at a time when fading recollection and *voir dire* could mitigate any perceived harm. Moreover, the Nevada Supreme Court acknowledged that the criminal proceedings were not actually prejudiced by Mr. Gentile's comments, App. at 4a, thus apparently confirming Mr. Gentile's prior assessment that the fairness of the proceedings would not be placed in jeopardy by his comments. Further, the timing of the disciplinary charge itself lends the case an odor of selectivity.

No one doubts that lawyers have special obligations. They must behave themselves in court. They must not reveal client confidences. Many rulemakers and courts, however, have taken the lawyer's oath and his entry of appearance as acts that symbolically shed First Amendment protection to talk about matters of public concern. Nevada is such a jurisdiction. See *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971). In Nevada, a lawyer simply has no First Amendment right to speak about a pending trial if such speech runs afoul of the various general ethical standards. Here, the conduct said to conflict with the general standard is itself conduct that lies at the core of First Amendment protection under the speech and press

clauses: A public press conference about police misconduct, in which the speaker had a sound factual basis for his measured allegations.

II. WHILE FAIR TRIALS ARE AN IMPORTANT CONSTITUTIONAL CONCERN, THE FIRST AMENDMENT REQUIRES THAT OTHERWISE PROTECTED SPEECH OF COUNSEL CANNOT BE PRECLUDED OR CHILLED ABSENT THE EXISTENCE OF A CLEAR AND PRESENT DANGER TO THE FAIRNESS OF A TRIAL.

A. The Widely Differing Standards Employed for Regulating Lawyer Speech About Pending Litigation of Public Concern Raise Important First Amendment Issues.

State courts and licensing authorities take widely differing approaches and apply different standards to resolve conflicts between a lawyer's free speech rights and the need for a fair trial, leaving lawyers uncertain about their obligations.³ See generally, Hoyer, *Silencing the Advocates or Policing the Profession? Ethical Limitations on the First Amendment Rights of Attorneys*, 38 Drake U.L. Rev. 31 (1988-89). See, e.g., *Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757, 763 (Tenn. 1989) (three standards applied in different jurisdictions: clear and present danger, serious and imminent threat, and reasonable likelihood of interference), *cert. denied*, 109 S. Ct. 3160 (1989). Federal courts are likewise split over the appropriate standard by which these competing interests are to be reconciled. Compare *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc) (rejecting that First Amendment requires a clear and present danger standard, reasonable likelihood of

³ The problem is heightened by the growth of the multi-city law firm, and by the increasing mobility of lawyers who may try cases in many jurisdictions, each with different rules. There may even be inconsistent state and federal court requirements in the same jurisdiction.

prejudice sufficient) *with Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) (First Amendment requires "serious and imminent threat" exist to fair trial before regulation permissible, reasonable likelihood insufficient), *cert. denied*, 427 U.S. 912 (1976).

1. Some Courts Hold That Disciplinary Rules Trump the First Amendment.

Some courts, including the Nevada Supreme Court, regard the existence of a lawyer no-comment rule as dispositive, and reject the need for any careful First Amendment balancing or scrutiny. *See Committee on Professional Ethics & Conduct v. Hurd*, 360 N.W.2d 96 (Iowa 1984); *Re Lacey*, 283 N.W.2d 250 (S.D. 1979); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211 (1972); *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971). Thus, these jurisdictions eschew any fact-specific reconciliation of the competing free speech and fair trial interests: Lawyer speech that falls within an ethical proscription is simply not protected speech under the First Amendment.⁴

The Nevada Supreme Court's summary rejection of Mr. Gentile's First Amendment claim was adumbrated in *Raggio*, a case cited at length in the Bar's brief in that court. *Raggio* was a district attorney who held a press conference about a pending case. The Nevada Supreme Court held the First Amendment does not "give a lawyer the right to openly denigrate the court in the eyes of the public." 487 P.2d at 500. It also repeated a theme that one finds throughout cases taking this narrow view of free speech, that the lawyer sheds First Amendment protection by becoming a member of the bar, or entering an

⁴ This analysis is incompatible with that employed in *Caplin & Drysdale v. United States*, 109 S. Ct. 2667, 2671 n.10 (1989) in which this Court held that a federal statute would trump "model disciplinary rules or state disciplinary codes." If a federal statute could so easily supersede state disciplinary rules, enforcement of a core constitutional guarantee such as the First Amendment should make short work of state disciplinary codes.

appearance as counsel in a case.⁵ Compare *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (in which the Court rejected such a rationale for limiting the Fifth Amendment protections of political party officials).

This Court, however, has rejected categorical rules that assume harm to the process in the free speech area. In the core category of speech on public affairs, this rejection is betokened by *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (legislative finding of clear and present danger no substitute for individual finding). Florida's categorical rule against witness disclosure of his own grand jury testimony was likewise held invalid in *Butterworth v. Smith*, *supra*. Even in the field of commercial speech, the Court has cautioned against substituting rules for reasons. *Shapero v. State Bar of Kentucky*, *supra* (categorical rule on solicitation). Especially where, as here, no actual harm occurred as a result of Mr. Gentile's comments, wooden adherence to categorical regulations of attorney speech imposes an unnecessary abridgement on speech. Indeed, Mr. Gentile must continue his practice ever vigilant that future violations could result in far harsher sanctions than a reprimand.

2. Courts Employ Different Standards to Reconcile These Competing Constitutional Interests.

State and federal courts have adopted different standards for determining when a lawyer's speech sufficiently jeopardizes a fair trial that it can be subject to regulation or discipline. In attempting to balance the competing interests of free speech and fair trial, courts have used a

⁵ This conclusion is inconsistent with this Court's rejection in *Wood v. Georgia*, 370 U.S. 375 (1962) of a similar argument that a court sheriff automatically enjoyed diminished First Amendment rights because of his obligations to the court. *Id.* at 393-94. Rather, the proper inquiry should be whether the speech itself presents a clear and present danger to the fairness of a judicial proceeding.

variety of balancing tests.⁶ The differing tests include: the "clear and present danger test,"⁷ the "serious and imminent threat" to the fair administration of justice test,⁸ the "substantial likelihood of material prejudice" test,⁹ or the least stringent "reasonable likelihood" of prejudice test.¹⁰ Significantly, these divergent standards are all ascribed to this Court, as lower courts have attempted to divine a standard faithful either to this Court's fair trial or free speech precedent. See, e.g., *Hirschkop v. Sneed*, 594 F.2d 356, 370 (4th Cir. 1979) (en banc) (tracing reasonable likelihood test to fair trial case of *Sheppard v. Maxwell*, 384 U.S. 333 (1966)); *id.* at 379 (Winter, J., concurring and dissenting) (clear and present danger test required under free speech precedent of *Bridges v. California*, 314 U.S. 252 (1959)).

Both the clear and present danger test and the serious and imminent threat test expressly incorporate a requirement of immediate harm, a requirement firmly rooted in this Court's First Amendment precedent. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829,

⁶ In *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981), the Kentucky Supreme Court upheld discipline of a lawyer who criticized a preliminary ruling by a trial judge in a litigation controversy involving abortion protests. The court justified its decision as "a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting an attorney's right to free expression." 602 S.W.2d at 167. See also *Nebraska State Bar Ass'n v. Michaelis*, 210 Neb. 545, 316 N.W.2d 46 (1982).

⁷ See, e.g., *Markfield v. New York*, 49 App.Div.2d 516, 370 N.Y.S.2d 82, *app. dismissed*, 37 N.Y.2d 794 (1975).

⁸ *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

⁹ ABA Model Rule of Professional Responsibility 3.6.

¹⁰ *Hirschkop v. Sneed*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757, 761 (Tenn. 1989).

845 (1978); *Bridges v. California*, 314 U.S. 252, 262 (1941). The other tests do not expressly require an immediate harm, but rather focus on the foreseeable likelihood of prejudice, a requirement traceable to this Court's fair trial precedent. See *Hirschkop v. Sneed*, 594 F.2d at 369-70 (citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966)). Given the vagaries of litigation, and the availability of alternate means such as *voir dire* by which to insure a fair trial, the elimination of a constitutional requirement for immediate harm is an important distinction. The practical impact of this distinction is especially apparent in a case like the present one, where counsel's comments came six months before the scheduled trial date, and extensive *voir dire* was conducted. Accordingly, it is singularly appropriate for this Court to provide guidance to lower courts as to the standard adequate to satisfy the competing constitutional interests in a fair trial and free speech.

In addition, this Court should consider whether alternative means exist which will protect fair trial interests while preserving counsel's free speech rights. Remedies such as extensive *voir dire*, change of venue, jury sequestration, or trial postponement have been identified by this Court as appropriate alternative remedies in a conflict between free speech and fair trial interests. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1976), citing *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In the post-Watergate era, the ready use of these proven methods of diminishing the adverse impact of pretrial publicity should reduce the probability of prejudice in cases, like the present one, where counsel's speech occurs months before a jury is selected and in which, according to the Nevada Supreme Court, no actual prejudice occurred. Compare *Stroble v. California*, 343 U.S. 181 (1952) (affirming death penalty despite prosecution's release to media of defendant's confession because publicity receded six weeks before trial and a thorough *voir dire* conducted).

III. THE REGULATION IS BOTH VAGUE AND OVERBROAD.

The vices of vagueness in a first amendment setting are too familiar to require extended description. See generally *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). In short, vague laws are infirm because their imprecision fails to give fair notice of proscribed conduct to those who would obey them and their ambiguity permits discriminatory enforcement. See *Kolender v. Lawson*, 461 U.S. 352, 358-59 (1983). Both vices are present in the enforcement of this regulation of speech.

The Nevada Supreme Court Rule at issue is taken from ABA Model Rule 3.6, successor to the ABA Model Code Disciplinary Rule 7-107. See generally Comment, *Restrictions on Attorneys' Extrajudicial Comments on Pending Litigation—The Constitutionality of Disciplinary Rule 7-107*: Hirschkop v. Snead, 41 Ohio St. L.J. 771 (1980). The Rule is cast as a prohibition of certain types of utterances, coupled with a list of comments that are presumptively within its sweep, and a further list of comments which the attorney may presumably safely make.¹¹ On its face, Mr. Gentile might reasonably have

¹¹ In pertinent part, the Model Rule reads:

"RULE 3.6 Trial Publicity

- (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
- (b) A statement referred to in paragraph (a) ordinarily is likely to have an effect when it refers to . . . a criminal matter . . . and the statement relates to:
 - (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

[Continued]

thought his comments fell within the permitted commentary about "the general nature of the . . . defense," "the information contained in a public record," and "that an investigation . . . is in progress, including the general scope of the investigation, the . . . defense involved and . . . the identity of the persons involved." The Nevada Supreme Court disagreed, however, and found his remarks to be within the prohibited zone because they were comments on the credibility of a potential witness.

Under the Nevada Rule, Mr. Gentile had to hazard a guess as to the permissible scope of his speech. For example, the categorical prohibition on uttering opinions on the guilt or innocence of a defendant found in Model

¹¹ [Continued]

- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial;
- . . .
- (c) Notwithstanding paragraphs (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
 - (1) the general nature of the claim or defense;
 - (2) the information contained in a public record;
 - (3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim of defense involved and, except when prohibited by law, the identity of the persons involved;
 - . . .
 - (7) in a criminal case:
 - . . .
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation."

Rule 3.6(b)(4) is contradicted by the Rule exception permitting discussion "without elaboration" on the "general nature of the claim or defense." Model Rule 3.6(c)(1). As between these shoals, where does an assertion of innocence lie?

Similarly, the prohibition allegedly infringed here, the ban on statements relating to the credibility of an expected witness under Model Rule 3.6(b)(1), is contradicted by the exception permitting speech on the "general scope of an investigation, the offense or claim of defense involved and . . . the identity of the persons involved" under Model Rule 3.6(c)(3). Under pain of discipline, counsel must thread the needle between these competing ambiguous admonitions.

Moreover, even when counsel's comments, as here, cause no actual prejudice to the proceedings and thus satisfy legitimate fair trial concerns, his speech may be sanctionable if he steered too close to credibility statements about expected witnesses or if he provided the proscribed "elaboration" while setting forth the nature of the defense. In sum, the Rule fails to afford sufficient notice of proscribed conduct to survive a vagueness challenge. The lack of fair notice is borne out on the facts of this case, as Mr. Gentile acknowledged during the press conference that he had consulted with other counsel as to the limitations the Rule placed on his speech, and he cited ethics rules as the reason he declined to respond to credibility questions during the press conference. App. at 11a.

The Supreme Court of Montana has previously struck Disciplinary Rule 7-107 on vagueness grounds because it fails to create "a clear standard by which attorneys can gauge their conduct." *Matter of Keller*, 213 Mont. 196, 693 P.2d 1211, 1214 (1984). The same infirmity afflicts Model Rule 3.6, as it also purports to set out safe harbors and forbidden paths for the advocate who wants to make public comment.

The Nevada and Model Rules use the "substantial likelihood" test, and impute a forbidden intent if the lawyer reasonably should know that the statement would be likely to have the forbidden effect. When clearly protected speech is brigaded with arguably unprotected speech or conduct, this Court has on occasion insisted that the actor must be proven to have intended to embrace unlawful conduct. See *Scales v. United States*, 367 U.S. 203, 229 (1961).¹² Such a test might properly form part of a test for lawyer speech about pending cases. It currently does not.

The possibility for discriminatory enforcement of such ambiguous admonitions is palpable. Here, Mr. Gentile reviewed the rules, App. at 2a, 11a, asserted that he was applying them in making disclosure determinations, App. at 11a, and caused no actual prejudice to the fairness of the recently scheduled but distant trial, App. at 4a. Nonetheless, his conduct was found punishable and he bears the stigma of being labeled as an unethical attorney ostensibly because he failed to reconcile the alternative ambiguous admonitions of the Rules. Certainly, the prospect of discriminatory enforcement will be present where, as here, an advocate's speech relates to corrupt law enforcement.

Moreover, even if the Rule facially applies to Mr. Gentile's speech, the Rule must be struck under the overbreadth doctrine because it plainly sweeps within it protected speech that fails to threaten fair trials. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

¹² Some jurisdictions adhere to traditional First Amendment principles, and require a searching, fact-specific inquiry into the allegedly offending speech, the counsel's intent, and the speech's impact. See, e.g., *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325 (W. Va. 1988), cert. denied, 110 S. Ct. 406 (1989); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App. 1974).

CONCLUSION

For the foregoing reasons, we respectfully urge that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

1a

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 20149

DOMINIC P. GENTILE,
Appellant,

vs.

THE STATE BAR OF NEVADA,
Respondent.

[Filed Feb. 21, 1990]

Appeal from a decision of the Southern Nevada Disciplinary Board of the State Bar of Nevada recommending that appellant be issued a private reprimand.

Affirmed.

Galatz, Earl, Catalano & Smith and Timothy C. Williams, Las Vegas, for Appellant.

Donald J. Campbell, Chairman, Southern Nevada Disciplinary Board, Las Vegas; Mary St. Clair, Executive Director, State Bar of Nevada, Las Vegas; John Howe, Bar Counsel, State Bar of Nevada, Las Vegas, for Respondent.

Kevin Kelly, Las Vegas, for Amicus Curiae National Association of Criminal Defense Lawyers.

OPINION

PER CURIAM:

The Southern Nevada Disciplinary Board of the State Bar of Nevada (the Board) recommended a private reprimand of attorney Dominic P. Gentile based on comments he made at a press conference regarding a pending criminal matter in which he represented the accused. In appealing the Board's decision, Gentile has expressly waived his right to confidentiality in these proceedings. Because we find that clear and convincing evidence supports the Board's recommendation, we affirm.

Appellant Dominic P. Gentile represented a client accused of taking money and drugs from a safety deposit box rented by undercover police officers. To respond to adverse publicity about his client, Gentile held a press conference the day after his client was indicted. He stated that he had evidence to prove that his client was innocent, and characterized his client as a scapegoat of the police. In addition, he criticized potential witnesses and their motives, and stated that they were convicted money launderers and drug dealers. He also named a certain police detective as the likely perpetrator and implied that the detective abused drugs. Gentile had researched the disciplinary rules regarding trial publicity prior to the conference.

A jury trial was held approximately six months later. Gentile's client was acquitted of all charges.

The State Bar of Nevada subsequently filed a complaint alleging that Gentile's remarks at the press conference violated Supreme Court Rule 177. Following a hearing, the Board found that Gentile had violated the rule and recommended that he be privately reprimanded. Gentile appeals the Board's decision.

Supreme Court Rule 177 states, in pertinent part:

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be

disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to . . . a criminal matter . . . and the statement relates to:

- (a) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness . . .

SCR 177(1)-(2)(a).

To determine questions of fact, a higher degree of proof is required in disciplinary matters than in ordinary civil matters. *In re Miller*, 87 Nev. 65, 72, 482 P.2d 326, 330 (1971). The standard is whether the findings are supported by clear and convincing evidence. *SCR 105(2)(e)*; *Copren v. State Bar*, 64 Nev. 364, 379, 183 P.2d 833, 840 (1947). However, the Board's recommendations, though persuasive, are not binding on this court. We must review the record de novo and exercise independent judgment to determine whether and what type of discipline is warranted. *State Bar v. Claiborne*, 104 Nev. 115, 126, 756 P.2d 464, 471 (1988); *In re Kenick*, 100 Nev. 273, 276, 680 P.2d 972, 974 (1984).

Based on our independent review of the record, we find that the discipline meted out by the Board was appropriate. Clear and convincing evidence supports the conclusion that appellant knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case. The "knows or reasonably should know" standard looks to what a person of reasonable prudence and intelligence ought to have known given the circumstances. A reasonable attorney, especially after having researched

the issue, should have known that his conduct was improper, particularly with respect to the comments regarding the police detective and other potential witnesses. In addition, the comments were "substantially likely" to prejudice the proceedings. The case was highly publicized, and the press conference was held the day after the grand jury indictment and the same day as the arraignment—a time when the intensity of public interest in a notorious case is at its peak. Furthermore, the comments were substantially likely to "materially prejudice" the proceedings. Although the evidence demonstrates that there was no actual prejudice in this case, absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice.

Furthermore, clear and convincing evidence supports the Board's finding that appellant violated SCR 177(2)(a). Appellant stated that he had evidence that a police detective took the drugs and the money, and implied that the detective had a drug problem. He also stated that potential witnesses were convicted money launderers and drug dealers, and accused them of lying to get themselves out of trouble. The fact that these comments were timed to have maximum impact and related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses establishes by clear and convincing evidence the substantial likelihood of material prejudice to the adjudication of the accused's criminal proceeding. We therefore conclude that appellant's comments fell within the scope of conduct prohibited by Supreme Court Rule 177(1)-(2)(a), and reject appellant's contention that they fell within the ambit of conduct permitted by Rule 177(3).

We also reject appellant's constitutional challenges as lacking merit under either the federal or Nevada constitutions.

Accordingly, we affirm the Board's decision.¹

/s/ Steffen, A.C.J.
STEFFEN

/s/ Springer, J.
SPRINGER

/s/ Mowbray, J.
MOWBRAY

/s/ Rose, J.
ROSE

¹ The Honorable Cliff Young, Chief Justice, has voluntarily disqualified himself from consideration of this case.

6a

PRESS CONFERENCE

RE:

GRADY SANDERS

LAS VEGAS, NEVADA

[2]

APPEARANCES:

DOMINICK GENTILE
Attorney At Law
302 East Carson
Suite 600
Las Vegas, NV 89101
(702) 385-0066

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[4] LAS VEGAS, NEVADA

MR. GENTILE: I want to start this off by saying in clear terms that I think that this indictment is a significant event in the history of the evolution of the sophistication of the City of Las Vegas, because things of this nature, of exactly this nature have happened in New York with the French connection case and in Miami with cases—at least two cases there—have happened in Chicago as well, but all three of those cities have been honest enough to indict the people who did it; the police department, crooked cops.

When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers' checks, is Detective Steve Scholl.

There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any [5] other living human being.

And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at Las Vegas Metropolitan Police Department and at the District Attorney's office.

Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

Now, up until the moment, of course, that they started going along with what detectives from Metro wanted

them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them.

Another problem that you are going to see develop here is the fact that of these other counts, at least four of them said nothing about any of this, about anything being missing until after the Las [6] Vegas Metropolitan Police Department announced publicly last year their claim that drugs and American Express Travelers' checks were missing.

Many of the contracts that these people had show on the face of the contract that there is \$100,000 in insurance for the contents of the box.

If you look at the indictment very closely, you're going to see that these claims fall under \$100,000.

Finally, there were only two claims on the face of the indictment that came to our attention prior to the events of January 31 of '87, that being the date that Metro said that there was something missing from their box.

And both of these claims were dealt with by Mr. Sanders and we're dealing here essentially with people that we're not sure if they ever had anything in the box.

That's about all that I have to say.

QUESTION FROM THE FLOOR: Do you believe any other police officers other than Scholl were involved in the disappearance of the dope and—

MR. GENTILE: Let me say this: What I believe and what the proof is are two different things. Okay? [7] I'm reluctant to discuss what I believe because I don't want to slander somebody, but I can tell you that the proof shows that Scholl is the guy that is most likely to have taken the cocaine and the American Express traveler's checks.

QUESTION FROM THE FLOOR: What is that? What is that proof?

MR. GENTILE: It'll come out; it'll come out.

QUESTION FORM THE FLOOR: Have you conducted your own investigation of Detective Scholl and his role in this?

MR. GENTILE: Well, yes. The answer to that is yes.

And I'm not—not only at liberty to discuss that now, George, but the fact is that I would be a pretty dumb lawyer if I gave it up now, wouldn't I?

QUESTION FORM THE FLOOR: I have seen reports that the FBI seems to think sort of along the lines that you do.

MR. GENTILE: Well, I couldn't agree with them more.

QUESTION FORM THE FLOOR: Do you know anything about it?

[8] MR. GENTILE: Yes, I do; but again, Dan, I'm not in a position to be able to discuss that now.

All I can tell you is that you're in for a very interesting six months to a year as this case develops.

You're going to like covering this one.

QUESTION FORM THE FLOOR: Do you think that Grady Sanders was indicted because maybe authorities think he knows something; maybe he didn't do it, but he knows?

MR. GENTILE: I think Grady Sanders was indicted because he—he was a scapegoat the day they opened the box.

Think about this for a second. The day that they opened a security box in a private vault company, they had a built-in scapegoat for ripping off anything they wanted out of their own box; anything, as do all of these so-called victims built-in. You couldn't ask for a better situation if you were going to try to run a scam like this.

You've got an automatic person to point the finger to, the proprietor, the man that ran the vault company.

You know, other law enforcement [9] agencies kept things on deposit at Western Vault Company, none of them have anything missing.

QUESTION FROM THE FLOOR: Such as?

MR. GENTILE: DEA, FBI, Customs.

But you know what the difference is? When they came in and they opened up their contact, they told Mr. Sanders, "We're the DEA. We're the FBI." Okay?

This undercover sting operation and any other type of undercover sting operation like this, it really endangers innocent people.

Forget about the people that they are trying to set up on these things.

I have my feelings about that and I'm sure that you do, too.

And some of those people are entrapped by these things, but when you are going to unwittingly use a person who is running a legitimate business and you are going to start storing major quantities of drugs and allegedly stolen property, at a minimum you ought to tell them that you're doing it.

A lot of things could have happened when these officers were flashing the drugs and flashing the money.

A lot of things could have happened.

[10] They, I think, unnecessarily endangered the lives of the employees of Western Vault Company by running the sting in that fashion.

QUESTION FORM THE FLOOR: Dominick, you mention you question the credibility of some of the witnesses, some of the people named as victims in the government indictment.

Can we go through it and elaborate on their background, interests—

MR. GENTILE: I can't because ethics prohibit me from doing so.

Last night before I decided I was going to make a statement, I took a good close look at the rules of professional responsibility. There are things that I can say and there are things that I can't. Okay?

I can't name which of the people have the drug backgrounds. I'm sure you guys can find that by doing just a little bit of investigative work.

QUESTION FROM THE FLOOR: What's Mr. Sanders been doing since he closed the vault?

MR. GENTILE: Well, Mr. Sanders is an entrepreneur. He has a number of businesses in town.

And, again, because of the stigma that attaches to merely being accused—okay?—I [11] know I represent an innocent man, Allen.

The last time I had a conference with you, was with a client and I let him talk to you and I told you that that case would be dismissed and it was. Okay?

I don't take cheap shots like this. I represent an innocent guy. All right?

And I don't want to have any more damage caused to Grady and his businesses merely by them coming to light as his other businesses.

QUESTION FROM THE FLOOR: Does he know anything about what happened to the police that opened the—

MR. GENTILE: No; nobody does except, I think, at least one metropolitan police department detective.

QUESTION FROM THE FLOOR: Did the cops pass the polygraph?

MR. GENTILE: Well, I would like to give you a comment on that, except that Ray Slaughter's trial is coming up and I don't want to get in the way of anybody being able to defend themselves.

QUESTION FROM THE FLOOR: Do you think the Slaughter case—that there's a connection?

MR. GENTILE: Absolutely. I don't think [12] there is any question about it, and—

QUESTION FROM THE FLOOR: What is that?

MR. GENTILE: Well, it's intertwined to a great deal, I think.

I know that what I think the connection is, again, is something I believe to be true. I can't point to it being true and until I can I'm not going to say anything.

QUESTION FROM THE FLOOR: Do you think the police involved in this passed legitimate—legitimately passed lie detector tests?

MR. GENTILE: I don't want to comment on that for two reasons:

Number one, again, Ray Slaughter is coming up for trial and it wouldn't be right to call him a liar if I didn't think that it were true.

But, secondly, I don't have much faith in polygraph tests.

QUESTION FROM THE FLOOR: Did Grady ever take one?

MR. GENTILE: The police polygraph?

QUESTION FROM THE FLOOR: Yes.

MR. GENTILE: No, he didn't take a police polygraph.

QUESTION FROM THE FLOOR: Did he take one [13] with you?

MR. GENTILE: I'm not going to disclose that now.

QUESTION FROM THE FLOOR: You pretty much knew this day was coming, even though you think your client was innocent?

MR. GENTILE: Yes. I think this day was pre-ordained before January 31, 1987.

I think that this day was in the minds of somebody that was involved in this thing the day they opened up the box.

They knew that they had a natural scapegoat. He was there. He was built-in. You couldn't ask for a better situation.

I'll tell you this: You're going to learn throughout these proceedings that the cops gave some of the cocaine away, which is totally unheard of, but gave away cocaine samples to people that they were trying to set up.

QUESTION FROM THE FLOOR: How much and how long?

MR. GENTILE: I can tell you of at least two events and maybe as much as 10 grams at a time. That's no small amount.

QUESTION FROM THE FLOOR: You use that as [14] an illustration that maybe things in this investigation weren't being done the way they were supposed to.

MR. GENTILE: They were playing very fast and loose.

You know, a number of the so-called sting—in fact, Allen, again, if you think about it, this sting operation is the one, it's the same one that I talked to you about when I represented John Vaccaro. Okay? Same one, same cop, Steve Scholl.

We've got some video tapes that if you take a look at them, I'll tell you what, he either had a hell of a cold or he should have seen a better doctor.

QUESTION FROM THE FLOOR: Do you think that whoever took the cocaine used it or sold it?

MR. GENTILE: That's a lot of cocaine to use, isn't it?

I don't know the answer to that. If I speculate, I'd have to say sold it.

So that's four grams—kilos of cocaine they're claiming.

QUESTION FROM THE FLOOR: I was referring to what you just said about whether or not—how you think—how he might have used some of it.

MR. GENTILE: I didn't say he used it. I [15] said he had a hell of a cold.

QUESTION FROM THE FLOOR: Where is the video tape from?

MR. GENTILE: I have it here, if you guys want to see it.

It's a video tape that was taken by metro in their undercover apartment in another case, one that is not the Sanders case, another case. In fact, it's the Vaccaro case.

I also have audio tapes. Again, it's rather bizarre conduct.

I mean I'm no stranger to criminal cases and it's unusual conduct.

QUESTION FROM THE FLOOR: What do the video tapes and audio tapes show?

MR. GENTILE: I would much rather let you see them and hear them than let me comment on them, and then you can make up your own mind.

Obviously, I wasn't prepared to set them up today, but you guys can have them any time you want.

It's unusual for a lawyer to end up with multiple cases growing out of the same episode and it kind of gives you a little bit of an edge over when you usually have to face one case cold.

[16] I wonder what would happen if there was really a network of defense attorneys in this town that started sharing testimony and stuff like that from times that police say that A and B happened, and then another time in another case it was C and D, but it was the same thing.

QUESTION FROM THE FLOOR: Thanks.

MR. GENTILE: Thank you for coming.

(The proceedings concluded.)

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[17] I hereby certify that I reported the within proceedings from videotape to the best of my abilities and transcribed same;

That the within is a true transcription of my shorthand notes so taken.

Dated this 31st day of May, 1983, at Las Vegas, Nevada.

/s/ Roger D. Calabrese
ROGER D. CALABRESE, CSR

No. 89-1836

Supreme Court, U.S.

FILED

JUL 17 1990

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

DOMINIC P. GENTILE,

Petitioner,

v.

STATE BAR OF NEVADA,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Nevada**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Nevada Supreme Court Rule 177, a parallel to ABA Model Rule 3.6, is constitutionally permitted against First Amendment challenge as a means for advancing the state's interest in the promotion of the administration of justice and fairness of trials, as applied in imposing a private reprimand upon a criminal defense lawyer for holding a press conference and making extrajudicial statements found to have a substantial likelihood of materially prejudicing an adjudicative proceeding.

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No. 89-1836

In The
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DOMINIC P. GENTILE,

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v.

STATE BAR OF NEVADA,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court of Nevada**

BRIEF IN OPPOSITION

The State Bar of Nevada, the Respondent, respectfully submits this brief in opposition to the petition for writ of certiorari to the Supreme Court of Nevada that was filed on May 22, 1990, by Dominic P. Gentile, the Petitioner.

STATEMENT OF THE CASE

The Petitioner, Dominic P. Gentile, is a criminal defense attorney in Las Vegas, Nevada. He was

disciplined by a private reprimand for a violation of Nevada Supreme Court Rule 177 relating to pre-trial publicity.

Dominic Gentile represented Grady Sanders in the defense of an eleven count Clark County Grand Jury indictment charging Sanders with grand larceny, trafficking in narcotics and racketeering. On February 5, 1988, on the day of Sanders' arraignment, Gentile held a press conference attended by electronic and print media. Gentile made statements to the press regarding a then pending criminal case, entitled, *State of Nevada vs. Grady Sanders*, Case No. C 81299.

During the press conference, Gentile made the following comments:

1) "Grady Sanders is an innocent person and had nothing to do with any of the charges," Pet., p. 8a;

2) "The person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers' Checks, is Detective Steve Scholl," Pet., p. 8a;

3) "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' Checks than any other living human being," Pet., p. 8a;

4) "I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at Las Vegas Metropolitan Police Department and at the District Attorney's office," Pet., p. 8a;

5) "The so-called other victims, one, two-four of them are known drug dealers and convicted money launderers," Pet., p. 8a;

6) "Now, up until the moment, of course, that the other victims started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now you can believe them," Pet., pp. 8a, 9a;

7) "I know I represent an innocent man," Pet., p. 12a;

8) "I'll tell you this: you're going to learn throughout these proceedings that the cops gave some of the cocaine away, which is totally unheard of, but gave away cocaine samples to people that they were trying to set up," Pet., p. 13a;

9) "We've got some videotapes that if you take a look at them, I'll tell you what, he (Steve Scholl) either had a hell of a cold or should have seen a better doctor," Pet. p. 14a.

Gentile knew that Detective Scholl would be a prosecution witness at Sanders' trial and he also believed that the "other victims" would be called as witnesses by the prosecution at trial. App., p. 4a.

The State Bar of Nevada presented a grievance to a three member Screening Panel (two attorneys and one laymember) who referred the matter for a formal disciplinary hearing. On December 6, 1988, the State Bar of Nevada filed a one count complaint against Dominic Gentile alleging a violation of Supreme Court Rule 177. App., pp. 1a, 2a.

On April 17, 1989, a five member Hearing Panel (four lawyers and one laymember) heard the evidence and viewed the videotape of the press conference and later found that Gentile violated Nevada Supreme Court Rule

177 in connection with his extrajudicial statements made to the press. Gentile referred to the innocence of his client. Gentile attacked the integrity of the criminal investigation and the credibility of prosecution witnesses. Gentile also commented on subjects, including polygraph tests, that he knew would not be admissible at the time of trial.

The Southern Nevada Disciplinary Board recommended the issuance of a private reprimand. Gentile appealed to the Nevada Supreme Court. The Court affirmed the decision by a vote of 4 to 0, Chief Justice Cliff Young having voluntarily disqualified himself from considering the case.

REASONS FOR DENYING THE WRIT

This case is not appropriate for review by this Court, for the following reasons.

1. **The Petition Attempts To Relitigate, In This Court, Factual Issues Decided Upon Questions Of State Law, Which Do Not Warrant Further Constitutional Review.**

While an attorney does not surrender the right to freedom of speech upon admission to the Bar, the attorney takes on an added responsibility, that of being an officer of the court with a duty to assist in the administration of justice and to refrain from actions which would result in the denial to any party of a fair and impartial trial. This responsibility must be balanced against the attorney's right of free speech. As stated in *Sheppard v.*

Maxwell, 384 U.S. 333 (1966), "Restrictions on an attorney's speech must reflect a balance between the interests of the public, the judiciary and the parties."

The disciplinary rules have been designed to provide a balancing test for these frequently competing interests of fair trial and free speech. Nevada Supreme Court Rule 177 was closely tailored to ABA Model Rule 3.6, which replaced DR7-107 in addressing the question of trial publicity. *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, Hazard, Vol. I, 1987 Supplement, p. 393.

Under the old provisions of DR7-107, the rule listed statements which were prohibited and statements which were permitted at various stages of the legal proceedings. It generally attempted to prohibit statements that were reasonably likely to interfere with a fair trial. The old standard was criticized by some courts as being vague or overbroad under the First Amendment. In drafting a new rule, ABA Model Rule 3.6, an attempt was made to meet this criticism. The first paragraph is designed to be analogous to a clear and present danger test. *The Law of Lawyering*, *id.* at 395. It prohibits statements that the lawyer reasonably should know "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." In the case of *In re Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), this Court said: "Courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."

In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), the Court invoked the

abstention doctrine so that a State Bar disciplinary hearing could be held involving attorney Hinds against interference by the Federal Courts.

At the start of a criminal trial, Hinds, a New Jersey attorney, took part in a press conference, making statements critical of the trial and of the trial judge's judicial temperament and racial insensitivity. Hinds referred to the criminal trial as a "travesty," a "legalized lynching," and "a kangaroo court." This Court held: "The State [of New Jersey] has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. . . . The State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance."

Nevada Supreme Court Rule 177, adopted on March 28, 1986, promotes the trial of cases in the courtroom rather than in the airwaves. The Rule reads:

Rule 177.

Trial Publicity.

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;

(b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(e) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty . . .

The petition asserts that Gentile's statements were protected speech. Pet., pp. i, 8. An analogy to the speech of public officials and to lawyer advertising is made for the purpose of suggesting that Gentile's statements

should be afforded the same measure of constitutional protection.

Petitioner claims that he held a public press conference about police misconduct, in which he had a sound factual basis for the allegations. Pet., p. 9. This statement confuses the real issue in that the press conference's principal purpose was not about police misconduct or corruption but rather about Gentile's upcoming trial presentation and Grady Sanders' professed innocence. Indeed, it was more analogous to a forum for advancing a lawyer's personal interests in fame and notoriety than in exposing police misconduct.

Gentile's admitted purpose for calling the press conference was (i) to counter public opinion which he perceived as adverse to Mr. Sanders, (ii) to attempt to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and (iv) to publicly present Sanders' side of the case. App., p. 4a.

Gentile could have utilized alternate forums for pursuing his grievance against police misconduct. The police department's internal affairs division or the City Council would have been appropriate reviewing bodies for Gentile's complaint. Even discussions with the media after the conclusion of the Sanders litigation would have avoided the threat of prejudicial influence to Sanders' criminal trial. There is nothing more than an unsupported suggestion that Gentile's motive for holding the February 5, 1988, press conference was to expose police misconduct.

2. The Nevada Supreme Court's Unanimous Decision Is Sound On The Merits And Does Not Conflict With Other Cases Requiring This Court's Exercise Of Discretionary Jurisdiction.

The Nevada Supreme Court correctly held that Supreme Court Rule 177 is constitutional by having rejected the Petitioner's constitutional challenges under either the federal or Nevada constitutions. The court found that Mr. Gentile's comments to the press "had a substantial likelihood of materially prejudicing the adjudication of his client's case." Pet., p. 4a.

The petition asserts that because there was no actual prejudice to the criminal proceeding, there was no harm caused by his comments. Pet., p. 8. The Nevada Supreme Court countered this position by indicating that "absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice." Pet., p. 4a.

A reasonably prudent standard is used in the context of Supreme Court Rule 177. The "knows or reasonably should know" standard relates to that which a person of reasonable prudence and intelligence ought to know given the like conditions and circumstances. Herein, Gentile, after having researched the ethical issues, should have known that his comments were substantially likely to prejudice the criminal proceedings. Especially, in light of the notoriety of Mr. Sanders' criminal case, a reasonable attorney would have taken appropriate precautions to guard against making virulent and vituperative remarks that in and of themselves tend to sway public opinion by instilling a prejudicial influence.

The petition claims that the different standards used by state courts and licensing authorities leave lawyers uncertain about their ethical obligations. Pet., p. 9. The three standards often used are: clear and present danger, serious and imminent threat, and reasonable likelihood of interference.

Although the language used is different, the conflict created is more semantical than real. The two cases cited by the Petitioner, *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976) ("serious and imminent threat") and *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) ("reasonable likelihood") arose on pre-enforcement review of DR7-107, a type of review that this Court discouraged in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). There was no disciplinary hearing held in either the Chicago Council or Hirschkop case, which is distinguishable from the present case.

In the case of *In re John Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn. 1989), cert. denied, 109 S.Ct. 3160 (1989), the Tennessee Supreme Court found no constitutional problem with a state disciplinary rule that bars lawyers in criminal proceedings from making public comments on matters such as the accused's guilt or innocence, the evidence, and/or merits of the case. In *Zimmerman, supra*, the conduct of a prosecutor in discussing trial matters was not done with any malicious intent nor done with the intent to interfere with the right to a fair trial of any of the defendants. In upholding a private reprimand, the court cited *In re Rachmiel*, 449 A.2d 505 (N.J. 1982), which held that attorneys are appropriately subject to carefully tailored

restraints on their free speech. The prohibition applied only to speech that is reasonably likely to interfere with or affect a fair trial. "Lawyers have an obligation to maintain the highest standards of ethical conduct," *Zimmerman*, at p. 761. Mr. Gentile had an equally compelling ethical obligation, which he ignored.

The Petitioner also suggests that courts have remedies such as extensive voir dire, change of venue, jury sequestration, or trial postponement to resolve the conflict between free speech and fair trial interests. Pet., p. 13. This proposition does not lend itself to judicial economy and the effective administration of justice if courts must make extensive inquiry as to the harm caused to each case on the docket due to pre-trial or trial press conferences.

Courts that are often confronted with the dilemma of changing venue or postponing trials in criminal matters do so to insure that the accused is given a fair trial. The Gentile matter, however, is a state disciplinary case, which attempts to enforce ethical standards that have been established to avoid these problematic areas. With the explosion of litigation, relaxation of the trial publicity regulation would only foster additional layers of work for courts that are presently overly burdened.

Lastly, the petitioner maintains that Nevada Supreme Court Rule 177 is vague and overbroad. Pet., pp. 14-17. A statute that is vague is generally confusing or nebulous so that an average person does not realize that the conduct he or she is engaging in is prohibited. A reasonably prudent person standard is applied in this case, which is

widely recognized and applied in the criminal and civil setting.

In the Matter of Disciplinary Proceedings Against Alan D. Eisenberg, 423 N.W.2d 867 (Wis. 1988), the Supreme Court of Wisconsin upheld the constitutionality of a similar rule patterned after ABA Model Rule 3.6. Eisenberg represented a woman charged with arson and the murder of her husband. Following the filing of a criminal complaint and prior to trial, Eisenberg held four separate interviews with reporters wherein "he felt compelled to help what he called a beautiful person who was also an abused woman and whose husband was a known hell-raiser, an alcoholic, and a wife beater, and I'll tell the jury what a rotten no-good son-of-a-bitch he was!" Mr. Eisenberg did not limit his attacks to the victim but also against the court, opposing counsel and a state trooper/witness.

The court in *Eisenberg* at p. 871 rejected a claim that the disciplinary rule in question acted as a "blanket prohibition" on pre-trial statements. The rule included explicit standards with a list of prohibited statements. Wisconsin's rule SCR 20:3.6 is indential to Nevada Supreme Court Rule 177.

Disciplinary problems arose in the Gentile case not because the statute is vague or overbroad but because Mr. Gentile misapplied the rule or failed to distinguish advocacy from potential prejudicial interference. Mr. Gentile was afforded sufficient consideration of the mitigating effect of his research efforts prior to the press conference by both the disciplinary board and the Nevada Supreme Court who imposed a private reprimand; whereas in

Eisenberg, supra, Mr. Eisenberg was given a two year suspension.

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

JOHN E. HOWE, Bar Counsel
State Bar of Nevada
500 South Third Street, Suite 2
Las Vegas, Nevada 89101
(702) 382-0502

Counsel Of Record For Respondent

APPENDIX

CASE NO. 88-43-82

STATE BAR OF NEVADA

SOUTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA,)	
)	
Complainant,)	
vs.)	COMPLAINT
DOMINIC P. GENTILE,)	
)	
Respondent.)	
<hr/>		

TO: DOMINIC P. GENTILE
302 E. CARSON AVE. #600
LAS VEGAS, NEVADA 89101

PLEASE TAKE NOTICE that pursuant to Supreme Court Rule (SCR) 105.2 a response to this complaint must be filed with the Southern Nevada Disciplinary Board Chairman, Donald J. Campbell, Esq., 300 S. 4th Street, Suite 1009, Las Vegas, Nevada 89101, and a copy must be served on John E. Howe, Esq., Bar Counsel, State Bar of Nevada, 500 S. 3rd Street, Suite 2, Las Vegas, Nevada 89101, both within twenty (20) days of service of this Complaint.

Complainant, State Bar of Nevada, by and through its Bar Counsel, John E. Howe, alleges that Respondent, Dominic P. Gentile, is now and at all times pertinent herein was, a licensed and practicing attorney in the state of Nevada, having his principal place of business for the practice of law in Clark County, Nevada, and that he engaged in acts of misconduct warranting the imposition of professional discipline as set out herein:

COUNT 1: On February 5, 1988, Respondent held a press conference attended by television and newspaper reporters. Respondent made statements to the press regarding a then pending criminal case in which he was attorney of record for defendant, Grady Sanders. Respondent's statements on the pending criminal case were of a nature which he knew, or reasonably should have known, would have a substantial likelihood of materially prejudicing the adjudicative proceedings in the case of the State of Nevada v. Grady Sanders. Respondent's said conduct was in violation of Supreme Court Rule (SCR) 177.

WHEREFORE, Complainant prays as follows:

1. That a hearing be held pursuant to Nevada Supreme Court Rule (SCR) 105;
2. That Respondent be assessed the costs of the disciplinary proceeding pursuant to Supreme Court Rule (SCR) 120.1; and
3. That pursuant to Supreme Court Rule (SCR) 102, such disciplinary action be taken by the Disciplinary Board for the Southern District of Nevada against Respondent as may be deemed appropriate under the circumstances.

DATED this 6th day of December, 1988.

STATE BAR OF NEVADA

By: John E. Howe
JOHN E. HOWE
 Bar Counsel
 500 S. 3rd Street #2
 Las Vegas, Nevada 89101
 (702) 382-0502

STATE BAR OF NEVADA
 SOUTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA,)	
)	
Complainant,)	Case No.
vs.)	88-43-82
DOMINIC P. GENTILE,)	
)	
Respondent.)	
_____)	

FINDINGS AND RECOMMENDATION

FINDINGS OF FACT

The Respondent, Dominic P. Gentile ("Gentile") was retained to represent Grady Sanders in late 1987 in connection with alleged criminal activity by Mr. Sanders. Mr. Sanders was indicated by the Clark County Grand Jury on February 4, 1988 on charges relating to the theft of a large quantity of cocaine and travellers checks. On February 5, 1988 - the day following the indictment of Mr. Sanders - Gentile held a press conference which was attended by members of the electronic and print media. A complete videotape and verbatim transcript of the press conference were introduced into evidence in this matter. At the press conference Gentile made the following statements:

- (i) "... the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being levelled against him, but that the person that was in the most direct position to have

stolen the drugs and the money, the American Express Traveller's checks, is Detective Steve Scholl."

(ii) "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Traveller's checks than any other living human being."

(iii) "Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two - four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something."

(iv) "Now, up until the moment, of course, that [the other victims] started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them."

(v) "I think Grady Sanders was indicted because he - he was a scapegoat the day they opened the [safe-deposit] box."

(vi) "We've got some video tapes that if you take a look at them, I'll tell you what, he [Detective Scholl] either had a hell of a cold or he should have seen a better doctor."

Gentile knew that Detective Scholl would be a prosecution witness at Mr. Sanders' trial and he also believed that the "other victims" would be called as witnesses by the prosecution at that trial.

Gentile's admitted purpose for calling the press conference was (i) to counter public opinion which he perceived as adverse to Mr. Sanders, (ii) to attempt to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and (iv) to publicly present Sanders' side of the case. As such, there was a substantial likelihood that the statements would materially prejudice the Sanders trial, which had been scheduled for August, 1988.

Prior to holding the press conference, Gentile conducted research on the question of what statements, if any, he was ethically permitted to make at the press conference. During the press conference, Gentile refused to comment on certain matters because he did not believe it ethically proper to do so.

On or about December 6, 1988 the State Bar of Nevada filed a complaint against Gentile alleging that the statements made by him at the February 5, 1988 press conference violated Supreme Court Rule 177. Gentile answered the complaint on January 13, 1989 denying that his actions violated the rule, and alleging several affirmative defenses.

CONCLUSIONS OF LAW

Supreme Court Rule 177 provides, *inter alia*, as follows:

1. A lawyer shall not make an extrajudicial statement that a reasonable person would

expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;

* * *

(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

The statements made by Gentile violated SCR 177(1), (2)(a) and (2)(d) in that they were statements which Gentile knew would be disseminated by means of public communication; which (i) related to the character, credibility, reputation and criminal record of witnesses in the trial of Mr. Sanders, and (ii) contained an opinion of the guilt or innocence of Mr. Sanders; and were known or should have been known by Gentile to have a substantial likelihood of materially prejudicing the Sanders trial.

SCR 177 does not violate either the United States or the Nevada constitution. The State Bar has not engaged in any unequitable conduct, nor has it applied SCR 177 in a selective manner.

Gentile's statements at the press conference went beyond the scope of the statements permitted by SCR 177(3).

RECOMMENDATIONS

The Southern Nevada Disciplinary Board recommends that Gentile be issued a private reprimand.

DATED this 12th day of May, 1989.

Southern Nevada Disciplinary Board,
DONALD J. CAMPBELL, Chairman

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY,
Chairman of
Disciplinary Panel

4
No. 89-1836

Supreme Court, U.S.

FILED

DEC 10 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE,
Petitioner,

v.

STATE BAR OF NEVADA,
Respondent.

On Petition for a Writ of Certiorari to the
Nevada Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner respectfully submits this brief in reply to respondent and to the Solicitor General. The Solicitor General underscores the importance of the issues in this case and establishes the need for this Court's review. His assertion that lawyer speech is subject to less constitutional protection than speech by a nonlawyer by virtue of the lawyer's special status has never been decided by this Court. The Solicitor General argues that because of this special status of attorneys, States need not establish that attorney speech poses a clear and present danger to fair trial interests before they can restrain such speech. In so arguing, the Solicitor General urges this Court to recognize a significant departure from First Amendment precedent, the propriety of which has divided federal and state courts.

While the Solicitor General concedes that federal and state courts have "employed a variety of verbal formulas" to resolve the tension between fair trial interests and free speech interests, he insists that these divergent standards somehow mask an underlying uniform view on this vital question; to the contrary, these diverse "verbal formula" reveal an as yet unresolved debate among state and federal courts.

I. THE SOLICITOR GENERAL'S AMICUS BRIEF REINFORCES THE IMPORTANCE OF THE FIRST AMENDMENT ISSUES RAISED

The amicus brief does not deride the importance of the issues raised in the petition. To the contrary, the Solicitor General argues that the State's interest in the fair administration of justice is sufficiently compelling to justify a departure from the standard of review traditionally applied to first amendment claims, the clear and present danger test. Amicus Brief, at 10. The Solicitor General

contends that petitioner's conduct was unethical and worthy of discipline. Amicus Brief, at 15.¹

The only argument raised by the Solicitor General against the appropriateness of review is that the petitioner allegedly obtained the benefit of a clear and present danger test because, in his view, such a test is implicit in the "reasonable likelihood of prejudice test" actually employed by the Nevada Supreme Court. Amicus Brief, at 15. The record does not support such a contention.

On the heels of this effort to recast variously formulated rules of ethics and judicial standards into the allegedly uniform adoption of a clear and present danger standard, the Solicitor General presents the contradictory argument that because of the special status of attorneys, the State can regulate their speech even if it does not pose a clear and present danger to legitimate fair trial interests. Amicus Brief, at 9. The Solicitor General further contends that the "reasonable likelihood" of prejudice test is sufficiently accommodating to satisfy the First Amendment as it pertains to attorney speech. *Id.* Thus, the Solicitor General posits a distinction between these two First Amendment tests: one, the clear and present danger test, is too stringent and is not compelled by the First Amendment, while the other, the "reasonable likelihood" test, adequately protects First Amendment interests for attorneys because they fall within a distinct category of "special access" speakers.

At the same time the Solicitor General argues for a special First Amendment classification for attorneys, deserving of diminished protection because of allegedly countervailing State interests, he summarily asserts that the "variety of verbal formula" employed by courts to

¹ Of course, even if this Court were ultimately to agree with this characterization of petitioner's conduct, petitioner's challenge that the speech regulations are overbroad would require the Court to determine whether the regulations nonetheless abridge protected speech.

scrutinize restrictions on attorney speech are functionally equivalent to the clear and present danger test afforded to nonlawyer speech. (Amicus Brief, at 15).

Of course, under the Solicitor General's assumption that all of the "verbal formulas" used by courts are reducible to the clear and present danger test, no appropriate vehicle will ever appear for this Court's review of this fundamental and recurring issue: Attorneys would always allegedly be overprotected as they will be beneficiaries of a standard, the clear and present danger test, to which they are not entitled because of their alleged special status.

With all due respect, petitioner disagrees and submits that the "variety of verbal formulas" followed by federal and state courts reflect substantive, not stylistic, differences. In the first place, the record in this case simply will not support the assertion that the Nevada Supreme Court applied any standard other than the "reasonable likelihood" of prejudice test. The record demonstrates that petitioner squarely presented the constitutional issue of the adequacy of the "reasonable likelihood" test to the Nevada Supreme Court, and it was summarily rejected. Indeed, the position of the Nevada Supreme Court is understandable given its belief that lawyers have no First Amendment protections regarding comment on pending litigation. See *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971).

Other courts have, like the Solicitor General in its amicus, acknowledged that the clear and present danger is more stringent than the "reasonable likelihood" test. For example, the difference in the substantive standards has given rise to a direct conflict in the federal circuit courts of appeals. Compare *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249-51 (7th Cir. 1975) (serious and imminent threat to fair trial interests required by first amendment, lesser standard in Model Code unconsti-

tutional), *cert. denied*, 427 U.S. 912 (1976), with *Hirschkop v. Snead*, 594 F.2d 356, 368 (4th Cir. 1979) (en banc) (rejecting a clear and present danger test; mere potential for prejudice sufficient regardless of its imminence). See also *Hirschkop*, 594 F.2d at 378 (Winter, J. and Butzner, J., dissenting) (clear and present danger test compelled by First Amendment; citing *Chicago Council* opinion).

Petitioner submits that the Seventh Circuit was correct in the *Chicago Council* case when it held that the clear and present danger test, described by that court as a "serious and imminent threat," was compelled by the First Amendment. *Chicago Council*, 522 F.2d at 249-50. Indeed, the Solicitor General acknowledges in its brief that those courts which have employed the "reasonable likelihood" of prejudice standard, as opposed to the "clear and present danger" test, have done so because of the "unique status of attorneys," (Amicus, at 14)—the central argument the Solicitor General raises here for the inapplicability of the traditional clear and present danger test to all attorney speech. (Amicus, at 9). Accordingly, the disagreement here is real, not imagined, and warrants plenary review by this Court.

While petitioner agrees with the Solicitor General that lawyer speech about pending cases poses special problems, this argues *for* rather than against review of this case. The fact that the Solicitor General would need to analogize to the cases of *Snepp v. United States*, 444 U.S. 507 (1980) and *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) to support his argument that trial counsel deserve diminished First Amendment protection is ample testament to the lack of guidance from this Court on this critical issue. The *Snepp* case involved a dispute over the enforcement of a contract requiring a former CIA employee to give the government prepublication review rights over disclosure of potentially classified material. The *Seattle Times* case involved a libel case in

which the defendant newspaper sought to publish material obtained through civil discovery despite a trial court's protective order prohibiting such use of the material because disclosure would embarrass and oppress plaintiff. Neither of these cases involve attorney speech or a potential conflict between fair trial interests and free speech.

According to the Solicitor General, these cases stand for the general principle that persons who are afforded special access to information may be subject to more stringent State regulation than ordinary citizens regarding its disclosure, and that trial counsel fall within this category of "special access" speakers subject to diminished First Amendment protection. This Court has never addressed this issue, much less resolved it in the manner the Solicitor General suggests. While many restrictions, including the duty to preserve client confidences, or to respect protective orders,² may properly apply to counsel in the use of information obtained as a result of the attorney-client relationship, none of these concerns are implicated here. Nor can the Solicitor General contend that counsel here was the beneficiary of any court-enforced "special access" to information in this case: the attorney speech occurred at the outset of the case and concerned the fruits of counsel's own investigation.³ Moreover, petitioner here was not operating under any court gag or protective order; the only restrictions on his speech were those of the disciplinary rules, rules

² See, e.g., *Alderman v. United States*, 394 U.S. 165, 185 (1969).

³ The Solicitor General's argument that access to information through the litigation process justifies restraint on its dissemination by an attorney disregards the exclusion of Section 3(b) of Nevada Superior Court Rule 177 that "public record" information may be disclosed, a category which would ordinarily include the fruits of civil discovery.

which are aimed at procuring fair trials, not policing the discovery process.⁴

This court's decisions have repeatedly shown that "ordinary" rules of lawyer conduct must yield to First Amendment requirements. *See, e.g., NAACP v. Button*, 371 U.S. 415, 428-29 (1963); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646-47 (1985); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

Petitioner submits that the proper resolution of the competing constitutional values is not advanced by a categorical rule such as the one used in Nevada, *see In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971), and urged by the Solicitor General here, which assigns all attorney speech to diminished First Amendment protection, but rather by a careful assessment of when the State's legitimate interest in securing a fair trial justifies a restriction on attorney speech. Moreover, the cure proposed by the Solicitor General—to have a client or spokesman for the client comment on the pending litigation (Amicus Brief, at 7)—is an invitation to the very evil, prejudicial pretrial publicity, that reasonable restrictions on attorney speech are designed to prevent. Simply as a policy matter, fostering unregulated lay commentary while silencing licensed attorneys is not the most prudent way to secure fair trials. As a constitutional matter, this solution sacrifices the First Amendment rights of counsel and client alike, as clients could not depend on counsel to advocate their interests both in and out of court.⁵

⁴ In essence, the government contends that all information acquired by counsel while litigation is pending is subject to an implied protective order barring disclosure because of counsel's special status. This contention sweeps far too broad, and would subject counsel to disciplinary sanctions merely for disseminating information.

⁵ Moreover, this Court has previously held, albeit in the different setting of speech on a college campus, that the government may not limit certain speech simply because alternative means of speech exist. *See Healey v. James*, 408 U.S. 169, 183 (1972).

II. WHETHER THE CHALLENGED RESTRICTIONS ON SPEECH ARE VOID FOR VAGUENESS RAISES ISSUES WORTHY OF THIS COURT'S REVIEW

The Solicitor General acknowledges this Court's long held view that the void for vagueness doctrine sweeps most broadly in the area of First Amendment rights, where ambiguous standards for the imposition of sanctions can chill the exercise of protected speech. Amicus Brief, at 16, citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Here, of course, the speech which is subject to regulation concerns matters properly at the heart of public discourse: our system of justice. While it is uncontested that speech prejudicial to the administration of justice should be subject to regulation, it should equally be beyond dispute that some speech in this arena falls within the protection of the First Amendment and its vital object of promoting full discourse in a democratic society. *See NAACP v. Button*, 371 U.S. 415, 429-30 (1963) (litigation may be a form of political discourse). In this case, petitioner respectfully submits that the widely used speech regulation involved here fails to give adequate notice of what is fair and what is foul, and is impermissibly overbroad.

Initially, the Solicitor General's claim that the standard applied here, a "reasonable likelihood" of prejudice, is sufficiently precise to withstand a vagueness challenge cannot be squared with the Solicitor General's position that this standard is duplicative of the "clear and present danger" test, a test which the Solicitor General also urges should not apply to attorney speech. If, as the Solicitor General suggests, the "variety of verbal formulas" used by numerous courts reflect judicial misapprehension of this common thread discerned by the Solicitor General, then this widespread confusion on the part of the lower courts is further evidence of the lack of precision in the standard employed in this case.

Rather than confront the difficulties that evidently attend an understanding of the "reasonable likelihood" of prejudice test on its face, the Solicitor General chose to

argue that this issue was either not addressed or was waived below. These arguments are without merit.

For example, the Solicitor General attempts to sidestep the apparent contradiction between Rule 177's prohibition on speech concerning a defendant's innocence in subsection 177(2)(d) and the authorization in subsection 177(3) to discuss "without elaboration," the general nature of the defense and the general scope of the investigation by contending that the Nevada Supreme Court did not address subsection 177(2)(d). Petitioner, however, was charged and found guilty of a subsection 177(2)(d) violation by the Disciplinary Board and the Nevada Supreme Court affirmed the findings of this Board. Similarly, the Solicitor General hopes to avoid petitioner's claim that Rule 177(2)(a)'s ban on witness credibility commentary is inconsistent with Rule 177(2)(c)'s authorization of commentary about the general scope of the investigation, including witness identifications, by arguing that this contention is waived because not raised below. The record contradicts this claim.

In the proceedings below, as here, petitioner urged that Rule 177 was both vague and overbroad on its face, and the state tribunals rejected this claim. This Court has upheld a litigant's right to raise such facial challenges, *see Grayned*, 404 U.S. at 114, and has willingly afforded broad independent judicial review of First Amendment claims "in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression'." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)).

Especially where, as here, the Solicitor General advances for the first time a categorical rule relegating attorney speech to an inferior First Amendment status, the question of adequate notice looms large.⁶ So too, the vice

⁶ In *Matter of Keller*, 213 Mont. 196, 693 P.2d 1211 (1984), the Montana Supreme Court held the Model Code provision unconstitutionally vague because courts had not resolved what was a constitu-

of discriminatory enforcement, the most important target of vagueness doctrine, *Kolender v. Lawson*, 461 U.S. 352, 358-59 (1983), is implicated on this record where the disputed speech concerns a suggestion of public corruption, and the timing of the discipline—after the jury verdict of acquittal—thickens the plot.

The lack of a clear standard is evident by the practices and positions of amicus in its own conduct of criminal litigation, and the attendant opportunities for discriminatory enforcement are self evident. The Department of Justice routinely issues press releases covering the issuance of indictments in cases that it believes are newsworthy. These releases often contain comments on the nature of the evidence that go beyond the language of the indictment and encompass much of the vouching and commentary complained of here. For example, in the highly charged area of federal prosecution of savings and loan fraud, where concern may well exist about the reasonable likelihood of comments prejudicing a fair trial, the Attorney General has spoken at length.

On October 25, 1990, a Department of Justice press release announced the indictment of the former owner and chief executive of a failed savings and loan. App. 1a. The Attorney General was quoted in this release as calling the defendant "one of the biggest savings and loan bandits in Texas" and cited his "free-wheeling lifestyle and fraudulent management practices" as setting the trend for "our national thrift crisis." DOJ Press Release, 90-448, "Former Western Savings Association Owner Indicted on Fraud Charges," October 25, 1990.

Similarly, in announcing the indictment of six individuals on "hate" crime charges, a Department release referred to a "skinhead" group, linked such groups to the "white supremacist movement," and noted that other groups such as the "Ku Klux Klan, the White Aryan Resistance and the Aryan Nation" were also investi-

tionally sufficient standard, thus leaving counsel unguided in how to regulate their speech.

gated.⁷ DOJ press release 90-447, "Justice Department Indicts Tulsa Skinheads for 'Hate Crimes'," October 25, 1990. App. 5a. The potential for discriminatory enforcement of state restrictions on attorney speech has also been enhanced by the current position of amicus that the Supremacy Clause of the Constitution prevents state ethical rules from overriding the obligations or authority of a federal government attorney acting under federal laws.

While this Court may not wish to encourage the ever increasing practice of press comments by litigating attorneys, it must acknowledge its existence. In the atmosphere of widespread press comments by prosecutors and defense attorneys, vague standards invite discrimination. This Court should grant review to bring clarity and precision to this difficult area.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the writ be granted.

Respectfully submitted,

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⁷ Compare *United States v. Abel*, 469 U.S. 45, 52 (1984) (membership in Aryan Brotherhood a proper subject for witness impeachment).

APPENDIX

APPENDIX

[LOGO]

DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE
THURSDAY, OCTOBER 25, 1990

AG
202-514-2007
TDD 202-514-1888

**FORMER WESTERN SAVINGS ASSOCIATION
OWNER INDICTED ON FRAUD CHARGES**

Attorney General Dick Thornburgh today announced that Jarrett E. Woods, Jr., of Dallas, former owner, chief executive officer, and chairman of the board of directors of Western Savings Association (Western) has been charged in a 37-count indictment with bank fraud and other violations.

Western was placed in receivership by the Federal Savings and Loan Insurance Corporation (FSLIC) on September 12, 1986. The failure of the institution is estimated to have cost more than \$1 billion. Western is on the list of top 100 priority cases developed by the Justice Department and the Office of Thrift Supervision (OTS).

Among other charges, today's indictment alleges that Woods conspired to divert approximately \$16 million from a \$60 million loan related to the purchase and development of Houston real estate.

"The indictment of Jarrett Woods means that we have corralled one of the biggest savings and loan bandits in Texas. The free-wheeling lifestyle and fraudulent management practices that led to Western's collapse helped set the trend for our national thrift crisis," Thornburgh said.

The indictment charges Woods with conspiracy to defraud government regulators, misapplication of Western's funds, bank fraud, causing false entries to be made in

Western's books, unlawfully participating in a Western transaction, and unlawfully receiving funds in connection with a Western transaction.

Thornburgh made the announcement in a news conference this afternoon with Marvin Collins, U.S. Attorney for the Northern District of Texas, and Richard Fishkin, head of the Dallas Bank Fraud Task Force and the Dallas Regional Office of the Fraud Section of the Criminal Division.

U.S. Attorney Marvin Collins said, "Woods is the 90th defendant to be charged by the Dallas Bank Fraud Task Force since its inception in August of 1987.

"The Department of Justice has secured the conviction of 338 defendants in major savings and loan fraud prosecutions in the last two years. Seventy-six percent of those convicted and sentenced have gone to jail and more than \$208 million in restitution has been ordered by the courts," Collins added.

Thornburgh also praised members of the Congress for increasing the Department's funding for savings and loan enforcement almost three-fold to \$160 million in the budget appropriation for fiscal year 1991.

"The increase in resources will enable federal law enforcement authorities to continue to pursue the sophisticated fraud schemes that have become the hallmark of the nation's thrift crisis," Thornburgh said.

According to the indictment filed in U.S. District Court for the Northern District of Texas, Woods is charged with conspiracy to defraud the Federal Home Loan Bank Board (now OTS) and the FSLIC and to misuse Western funds to cure delinquencies in loans to one of Western's major borrowers.

In addition, the indictment charges that Woods misused Western funds for personal benefit including the payment of his gambling debts.

The indictment alleges that in November 1985, Woods conspired to divert approximately \$16 million from a \$60 million loan to Baypointe Investments, Inc. The stated purpose of the loan was for the purchase and development of property near Houston. The loan proceeds were diverted to James Reagin, one of Western's major borrowers, who was facing financial difficulties. Most of the money was used to make payments on Reagin-related loans at Western and other financial institutions. Woods allegedly caused this diversion to be concealed in order to prevent the discovery of Western's and Reagin's true financial condition.

The indictment also alleges that Woods diverted profits of about \$2.26 million belonging to Western from a sale of property in Cedar Hill, Texas in order to accomplish the same purpose, i.e., making payments on Reagin-related loans. Again, Woods allegedly caused his institution's books to conceal the diversion.

Woods is also charged with using Western to generate about \$558,000 that was used for his personal benefit. In one major transaction, Woods allegedly charged a secret \$510,000 loan fee to a borrower which he used to make a payment on another borrower's loan.

In another transaction, Woods allegedly had a Western subsidiary pay \$48,000 to a company as a commission even though the company had done nothing to earn the money. The \$48,000 was allegedly a gambling debt Woods owed to the company's president.

Woods faces maximum penalties upon conviction of 185 years imprisonment and fines of \$250,000 each for counts 1-33 or approximately twice the amount of his financial gain or twice the amount of loss to Western. He also faces a maximum fine of \$30,000 for the remaining four counts of the indictment.

The case is being handled by the Dallas Bank Fraud Task Force, which includes attorneys from the Dallas

Regional Office of the Fraud Section, Criminal Division; attorneys from the Tax Division; Assistant U.S. Attorneys from the Northern District of Texas; examiners from the Office of Thrift Supervision; and agents of the FBI and IRS.

The continuing investigation of Western is being handled by Mark A. Adler of the Criminal Division and Assistant U. S. Attorney Susan Greenberg.

* * * *

90-448

[LOGO]

DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE

THURSDAY, OCTOBER 25, 1990

AG

202-514-3392

TDD 202-514-1888

JUSTICE DEPARTMENT INDICTS
TULSA SKINHEADS FOR "HATE CRIMES"

TULSA, OK—Attorney General Dick Thornburgh and U.S. Attorney Tony Graham today announced a 13-count indictment of six members of a Tulsa Skinhead group on "hate crime" charges including violence and intimidation against Hispanic, Jewish, Black, and Arab citizens as well as other minorities.

"Not only do such 'hate groups' commit outrageous acts of violence against our citizens, but they seek to engage in a concentrated effort to tear apart the moral fabric of our society," Thornburgh said.

"Their 'hate crimes' are not just a threat to their victims, but a threat to the first civil right of all Americans—the right to be free from fear in our homes, on our streets and in our communities.

"During the past two years, the Department of Justice has stepped up its investigation of racial, religious and ethnic violence, registering 101 convictions in 20 states. Acts investigated range from the desecration of synagogues to racially-motivated murders," said Thornburgh.

When announcing the indictment, the Attorney General commended the U.S. Attorney's Office, Tulsa Chief of Police Drew Diamond, the Tulsa Police Department's Civil Rights Unit Director Dan Allen, the Federal Bureau of Investigation Special Agent in Charge for the Oklahoma City Division Bob Ricks, and Civil Rights Division attorneys Alan Tieger and Kathleen Mahoney, for their successful joint efforts.

Skinheads are organized groups of young persons adopting distinctive hair-style, garb and philosophy. Some skinhead groups are part of the white supremacist movement, but not all skinhead groups are considered racist groups.

Other organized hate groups whose conduct has been investigated by the Federal authorities include the Ku Klux Klan, the White Aryan Resistance and the Aryan Nation.

On October 19, 1990, three white supremacists were convicted of plotting to firebomb a minority discotheque in Seattle, Wa. The three, indicted and convicted in Boise, Idaho, are connected to the supremacist group Aryan Nation. They were convicted by a jury of conspiracy; knowingly making, receiving, or possessing bombs or grenades; carrying firearms in relation to a crime of violence; and crossing state lines to commit a crime.

Earlier this year in Dallas, Texas, 17 individuals associated with the Confederate Hammerskins skinhead group were charged and convicted for their involvement in civil rights conspiracies that targeted Black, Hispanic and Jewish citizens in Dallas. The sentences for the five defendants who went to trial ranged from 4¾ to 9½ years. One of these five, Michael Lewis Lawrence, is also a defendant in today's Tulsa indictment. The remaining 12 Hammerskin defendants plead guilty to charges of racial violence.

"Racial, ethnic and religious violence is not a one-victim crime, but a crime against an entire community. By spreading their hatred across our neighborhoods, public accommodations, houses of worship and even graveyards, these groups seek to make all citizens their victims and to instill fear in a wide variety of innocent Americans," said Thornburgh.

Charged with civil rights violations in the Tulsa indictment, in addition to Michael Lewis Lawrence, are Daniel Roush; Forrest Hyde; Tina Christopher (AKA

Tina Lawrence); Christopher Jones; and Gregory Kenicutt.

Between July 1988 and August 1989, the defendants are charged with joining with other associates of the Tulsa Skinhead group at various public parks and live music clubs in Tulsa, where they are alleged to have repeatedly intimidated and assaulted minority group members and persons whom they believed associated with minorities.

Allegedly, on various occasions each of the defendants drove to Club Nitro, a live music club, owned by an Arab-American, and physically attacked or harassed the minorities and "race-mixers" they believed frequented the establishment. Specific charges include: in March of 1989, the owner was struck over the head with a brick; in April, 1989, mototov cocktails were hurled into the occupied club; in June, 1989, a patron of the club was beaten and kicked into unconsciousness; and in July, 1989, patrons of the club were attacked with baseball bats.

The defendants also allegedly posted intimidating and anti-minority leaflets around the club and drove by the club shouting white supremacist slogans and racial slurs at the patrons.

When announcing the indictment, Graham stated, "Civil rights violations affecting any citizen of the Northern District of Oklahoma continue to be a high priority with the U.S. Attorney's Office. We will expend whatever resources are necessary in conjunction with the Department of Justice's Civil Rights Division to bring the perpetrators of these crimes to justice."

Count One of the Tulsa indictment charges all defendants with Conspiracy to Interfere with Civil Rights. The defendants allegedly intimidated and physically attacked minority citizens and persons associated with them when they attempted to use public accommodations in Tulsa.

Counts Two through Ten charge various defendants with interference with federally protected activities and stem from physical attacks at several parks and live music clubs in Tulsa.

Count Eleven charges defendants Lawrence and Kennicutt with use of fire or an explosive device in the commission of a felony and Count Twelve charges them with damage to a building used in interstate commerce. Count Thirteen charges both Lawrence and Kennicutt with possession of a destructive device. Both allegedly participated in an attack on Club Nitro by throwing Mototov cocktails into the club.

If convicted of all charges, the defendants face the following maximum prison terms and criminal fines: Lawrence—115 years and \$2.75 million; Rousch—20 years and \$500,000; Hyde—20 years and \$500,000; Christopher—30 years and \$750,000; Jones—40 years and one million dollars; and Kennicutt—75 years and \$1.75 million.

The federal grand jury investigation has also resulted in the conviction of four other adults and five juveniles associated with the Tulsa Skinhead group. These defendants pled guilty to charges lodged against them for their involvement in similar Skinhead violence in Tulsa.

* * * *

③
No. 89-1836



In the Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE, PETITIONER

v.

STATE BAR OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

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QUESTION PRESENTED

Whether Nevada Supreme Court Rule 177, which restricts extrajudicial attorney statements concerning pending litigation, violates the First Amendment.

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In the Supreme Court of the United States

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No. 89-1836

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STATE BAR OF NEVADA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner, a criminal defense attorney in Las Vegas, Nevada, represented a client charged with grand larceny, drug trafficking, and racketeering. In response to adverse publicity about his client, petitioner held a press conference, attended by the electronic and print media, the day after his client was indicted. In the course of his statements at the press conference, petitioner vouched for his client's innocence;¹ said that his client

¹ Petitioner stated:

I know I represent an innocent man, Allen.

The last time I had a conference with you, was with a client and I let him talk to you and I told you that that case would be dismissed and it was. Okay?

I don't take cheap shots like this. I represent an innocent guy. All right?

Pet. App. 12.

was a "scapegoat," Pet. App. 8a; attacked the credibility of potential prosecution witnesses, calling them drug dealers and money launderers, *ibid.*; and named a police detective, who he knew would be a prosecution witness, as a drug abuser and the likely perpetrator of the crime.²

The trial of petitioner's client took place approximately six months later. Petitioner's client was acquitted on all charges.

2. On December 6, 1988, the State Bar of Nevada filed a one-count complaint against petitioner alleging a violation of Nevada Supreme Court Rule 177. R. 8-9. That provision is identical to ABA Model Rule of Professional Conduct 3.6. It states in pertinent part:

1. A lawyer shall not make a extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to * * * a criminal matter * * * and the statement relates to:
 - (a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness * * *.
 - * * *
 - (d) any opinion as to the guilt or innocence of a defendant * * * in a criminal case * * *;
 - * * *
3. Notwithstanding subsection 1 and 2 (a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

² Petitioner stated: "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being." Pet. App. 8a.

(a) the general nature of the claim or defense;

* * *

(c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim of defense involved and, except when prohibited by law, the identity of the persons involved * * *.

Following a hearing, the Southern Nevada Disciplinary Board of the State Bar of Nevada found that petitioner had violated Rule 177 and recommended that he be privately reprimanded. The Board found that petitioner knew the detective he accused of perpetrating the crime and abusing drugs would be a witness for the prosecution. R. 18. It also found that petitioner believed others who petitioner characterized as money launderers and drug dealers would be called as prosecution witnesses. *Ibid.* In light of the contents, the setting, and the timing of petitioner's statements to the media, the Board concluded that petitioner knew or should have known that those statements would have a "substantial likelihood of materially prejudicing" the fairness of his client's trial. R. 20.

3. Petitioner took an appeal to the Nevada Supreme Court, which affirmed the Board's decision. Pet. App. 2a-5a. The court found by "[c]lear and convincing evidence" that petitioner "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." *Id.* at 3a. In so finding, the court noted that the case was "highly publicized"; that the press conference, held the day after the indictment and the same day as the arraignment, was "timed to have maximum impact"; and that petitioner's comments improperly "related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses * * *." *Id.* at 4. Although the court found that the comments caused "no actual prejudice in this case," it concluded that "ab-

sence of actual prejudice does not establish that there was no substantial likelihood of material prejudice." *Ibid.* The court rejected petitioner's contentions that his comments were permitted by Section 3 of Rule 177, and that the Rule violated his right to free speech under the federal and Nevada constitutions. *Ibid.*

DISCUSSION

Petitioner contends that Nevada Supreme Court Rule 177 violates the First Amendment. He argues that by employing the standard of "substantial likelihood of material prejudice," Rule 177 impermissibly restricts extrajudicial comments by attorneys when those comments do not present a "clear and present danger" or a "serious and imminent threat" to the fair administration of justice. Petitioner argues further that parts of Rule 177 are unconstitutionally vague.

In our view, petitioner has not advanced a colorable constitutional claim. The First Amendment does not require that a State demonstrate a "clear and present danger" to the fairness of a pending judicial proceeding before it may restrict an attorney's freedom to comment on that proceeding. Because of the special status of lawyers in the judicial system, we believe that state ethical codes may constitutionally regulate attorneys' comments on judicial proceedings whenever it appears reasonably likely that the comments will adversely affect the fairness of those proceedings.

It is not necessary to decide that constitutional issue in this case, however, because the pertinent ethical rules adopted in 24 States, including Nevada, are patterned after the ABA's Model Rule of Professional Conduct 3.6,³

³ Rule 3.6 has been adopted by 18 States without change and by 6 States with revisions. The 6 States are Florida, Illinois, North Carolina, and Oklahoma, in which the Rule was extensively revised; Michigan (and the District of Columbia), in which everything after the first paragraph was deleted; and Texas, in which the comment was extensively revised.

which was drafted to satisfy the "clear and present danger" standard. The rule that was applied in petitioner's case therefore satisfied the First Amendment even if the "clear and present danger" test is constitutionally required in this setting. Moreover, the Disciplinary Board and the Nevada Supreme Court were correct in concluding that petitioner's inflammatory comments were subject to censure under that standard. Finally, there is no substance to petitioner's contention that Rule 177 is void for vagueness.

1. Nevada's ethical rules governing attorney comments on pending litigation do not offend the First Amendment. Petitioner's argument to the contrary depends on his assertion that "the proper inquiry should be whether the speech itself presents a clear and present danger to the fairness of a judicial proceeding." Pet. 11 n.5. If petitioner is wrong, and the First Amendment permits States to regulate lawyers' comments on pending litigation whenever comments are reasonably likely to prejudice the administration of justice, then petitioner has no plausible constitutional defense to the private reprimand at issue in this case.

It is well settled that the right to publish lawfully obtained information relating to a pending proceeding may be denied only if publication threatens a governmental objective of the highest order (a "clear and present danger"), usually to the fairness of an accused's trial. See, e.g., *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-106 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837-845 (1978); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310-312 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-570 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487-497 (1975).

Different considerations, however, apply to a lawyer's authority to divulge information relating to a pending proceeding. A lawyer has a professional obligation not to make comments that appear reasonably likely to en-

danger the fairness of his client's trial.⁴ A lawyer is not in the same position as private citizen with respect to the judicial system. Rather, the lawyer has a "fiduciary obligation to the courts." ABA Standards for Criminal Justice, *Fair Trial and Free Press* 82 (1968). The right to regulate attorney comments regarding judicial proceedings is an aspect of the States' broad power to regulate the practice of law, a power that is "especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); see *In re Primus*, 436 U.S. 412, 422 (1978); *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961) (courts have for centuries possessed authority "over members of the bar, incident to their broad responsibility for keeping the administration of justice and the standards of professional conduct unsullied. * * * [L]awyers must operate * * * as assistants to the court in search of a just solution to disputes.").

⁴ Courts have recognized that "restricting the extrajudicial statements of criminal defense attorneys relates to the government's substantial interest in preserving the proper administration of justice and the basic integrity of the judicial process." *In re Hinds*, 90 N.J. 604, 449 A.2d 483, 489 (1982). As the court stated in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), "public justice is no less important than an accused's right to a fair trial." See *Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979) (en banc).

Petitioner does not suggest that the protection of trial fairness is an insufficiently compelling governmental interest to warrant restrictions on attorney statements to the media concerning pending criminal litigation. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), this Court called on courts to promulgate rules protecting their processes from prejudicial outside interference, and explicitly stated that "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." *Id.* at 363; see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring in the judgment).

The lawyer's duty to his client does not override these interests. In situations in which an accused wishes publicly to insist on his innocence, he can always make a statement himself or through a spokesman. That he insists that his lawyer do so may reflect that he wants more than simply to voice his side of the story. He wants his attorney to make his case for him in public, because the special knowledge and high standards to which his attorney is held makes his attorney more likely to be believed. Yet it is precisely those special features of his attorney's status that can make his inflammatory remarks especially inimical to the fairness of the judicial proceedings on which he is commenting.

A lawyer's First Amendment right to make extrajudicial comments on a pending proceeding is on especially weak ground when the information he seeks to disseminate is a byproduct of the State's license to practice law. By virtue of the status conferred on him by the State, a lawyer often enjoys special access to information about a case from such sources as pretrial discovery and plea discussions with prosecutors. The State, we submit, can lawfully condition the lawyer's right to practice law on his exercise of responsible restraint in using the information that comes to him by dint of his state-conferred license.

The diminished role of the First Amendment in such a setting is illustrated by *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), in which this Court held that a newspaper could be prevented from publishing information that it had obtained through pretrial discovery. Because judicial discovery proceedings grant the parties special access to information for specific, limited purposes, the Court concluded that "judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." *Id.* at 34.

The Court's decision in *Snepp v. United States*, 444 U.S. 507 (1980), likewise suggests that the special right of access to information granted to certain persons may constitutionally carry with it a fiduciary duty to follow "reasonable restrictions" on the dissemination of that information. *Id.* at 509 n.3. Upon joining the Central Intelligence Agency, Snepp signed a contract in which he undertook an obligation "not to publish any information relating to the Agency without submitting the information for clearance." *Id.* at 511 (emphasis in original).⁵ Snepp violated that obligation when he published the book *Decent Interval* after leaving the Agency without first presenting it for review. *Ibid.* This Court enforced Snepp's fiduciary obligation and upheld the imposition of a constructive trust on all profits from the sale of the book. *Id.* at 516. It did so even though the United States conceded that "Snepp's book divulged no classified intelligence." *Id.* at 510. The Court reasoned that Snepp could be held to "reasonable restrictions" on the dissemination of information potentially undermining the Agency's activities. *Id.* at 509 n.3, 511. So too, through ethical rules an attorney's status as a member of the bar imposes duties on him, in handling information that comes to him only because of his special status, analogous to the duties imposed by the employment contract in *Snepp*.

The distinction between attorney and non-attorney speech finds additional support in *In re Sawyer*, 360 U.S. 622 (1958). In that case, a majority of the Members of this Court agreed that ethical precepts can require attorneys to abstain from what would otherwise be constitutionally protected speech. *Id.* at 646-647 (Stewart, J., concurring); *id.* at 668 (Frankfurter, J., dissenting). State regulation of an attorney's comments implicating

⁵ Snepp's obligation was contractual, see 444 U.S. at 508 & n.1, but this Court noted that the prohibition on publication absent clearance could be imposed "even in the absence of an express agreement." *Id.* at 509 n.3.

the fairness of his client's trial is also consistent with this Court's repeated recognition of trial judges' broad latitude to restrain lawyers' statements regarding trials over which they preside:

[O]n several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 529, 563 (1976); *id.*, at 601 and n. 27 (Brennan, J., concurring in judgment); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310-311 (1977); *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966). "In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104, n. 21 (1981).

Seattle Times Co. v. Rhinehart, 467 U.S. at 33 n.18.

In sum, two complementary considerations—the lawyer's special access to information and his special duty to ensure that its release does not prejudice pending proceedings—justify the State in imposing reasonable restrictions on the dissemination of information in settings in which similar restraints could not constitutionally be imposed on ordinary citizens. Nevada Supreme Court Rule 177 proscribes only those comments a lawyer knows (or reasonably should know) "have a substantial likelihood of materially prejudicing an adjudicative proceeding." Since the First Amendment, in our view, permits States to restrict extrajudicial attorney statements that are "reasonably likely" to jeopardize the fairness of pending proceedings, it follows that petitioner's private reprimand does not violate the First Amendment.

2. For the reasons set forth above, we submit that the First Amendment does not limit state regulation of attorney comments on pending litigation to situations in which commentary poses a "clear and present danger,"

as petitioner assumes. Nonetheless, Nevada and the other 23 States that have adopted ABA Model Rule of Professional Conduct 3.6 have in effect adopted that standard as a matter of policy. Because the Nevada Supreme Court applied that standard to the statements at issue in this case, petitioner has already received the benefit of the lenient standard that he asks this Court to adopt as a matter of constitutional mandate.

The "substantial likelihood of material prejudice" standard set out in ABA Model Rule 3.6 (and in Nevada Rule 177) was fashioned to "approximate[] clear and present danger by focusing on the likelihood of injury and its substantiality." ABA Annotated Model Rules of Professional Conduct 243 (1984). Under that standard, "the danger of prejudice to a proceeding must be both clear (material) and present (substantially likely)." G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 397 (1985); see *In re Hinds*, 90 N.J. 604, 449 A.2d 483, 493 (1982) (recognizing that "substantial likelihood of material[] prejudic[e]," like "serious and imminent threat," is a "linguistic equivalent[]" of "clear and present danger"). Accordingly, the decision of the Nevada Supreme Court to uphold the disciplinary action against petitioner under the "substantial likelihood of material prejudice" standard creates no conflict with the First Amendment even if the "clear and present danger" test is constitutionally required in this setting.

a. Petitioner does not view the "clear and present danger" test and the "substantial likelihood of material prejudice" test as equivalent. He contends that the latter lacks any requirement of temporal proximity. But strict temporal proximity is not a necessary element of the "clear and present danger" test, particularly in this setting. In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), this Court stated that the "clear and present danger" test was "never intended to 'to express a technical legal doctrine or to convey a formula

for adjudicating cases.' " *Id.* at 842 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 353 (1946) (Frankfurter, J., concurring)). Rather, in the context of statements affecting judicial proceedings, the test requires courts to examine "the particular utteranc[e] * * * in question and the circumstances of [its] publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment.'" *Landmark Communications*, 435 U.S. at 844 (quoting *Bridges v. California*, 314 U.S. 252, 271 (1941)); see *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 562 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (L. Hand, J.) (test is whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"), *aff'd*, 341 U.S. 494 (1951)). The annotations to Rule 3.6 indicate that the "substantial likelihood of material prejudice" test is to be applied according to the approach described in *Landmark Communications* and that a significant factor in determining "the seriousness and imminence of the threat [is] the timing of the statement." Annotated Model Rules, *supra*, at 243.

There is no merit to petitioner's suggestion that under the "clear and present danger" test attorney statements must in all cases cause "immediate harm." Pet. 12-13. If that were so, only statements made during or on the eve of trial could be regulated, and attorneys would be free to make the most outrageously prejudicial comments during the pretrial period. The Seventh Circuit addressed this point in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (1975), cert. denied, 427 U.S. 912 (1976). Although the court applied a version of the "clear and present danger" test, it stated that several types of attorney comment may be prohibited during the period from arrest or indictment to the commencement of trial. *Id.* at 254. As the court explained, because the possibility of prejudice at that stage becomes "concrete," and be-

cause of the need to "prevent[] the appearance that the merits of a particular pending prosecution are being tried in the press," the "balance [during the pre-trial period] swings more toward the necessity of prohibiting certain speech * * *." *Id.* at 253-254.

b. Petitioner intimates, Pet. 8, 11, that actual prejudice must be shown before an attorney can be disciplined for his extrajudicial comments. That contention is likewise insubstantial. Courts have uniformly held that an attorney may be disciplined for his extrajudicial comments based on the likelihood of prejudice to pending judicial proceedings at the time the comments were made; no court has suggested that an actual effect must be proved. See *In re Conduct of Lasswell*, 296 Or. 121, 673 P.2d 855, 858 (1983) (the disciplinary rule properly "deals with purposes and prospective effects, not with completed harm").

If actual prejudice were required, even manifestly unethical attorney comments having a substantial likelihood of prejudicing pending proceedings could not result in disciplinary action whenever it subsequently turned out—even for wholly fortuitous reasons—that no actual prejudice occurred. For example, a defense attorney who made blatantly improper and prejudicial comments might be immune from punishment merely because the government, for reasons unrelated to the comments, decided to dismiss the charges against his client, because his client subsequently chose to enter a guilty plea, or because the government ultimately obtained a conviction despite the prejudicial publicity engendered by the comments. Under such a regime, the deterrent impact and uniform application of disciplinary rules regulating extrajudicial attorney comments would be seriously undermined. The fundamental flaw in petitioner's argument is its failure to recognize that attorney comments posing a substantial threat to the fairness of pending proceedings are in themselves deserving of punishment, regardless of their ultimate effect, much as a failed attempt to commit a

crime is no less illegal for the fact that the crime was unsuccessful.

c. As petitioner points out, courts have employed a variety of verbal formulas in determining whether a threat to the fairness of judicial proceedings from attorney statements is sufficiently great to warrant disciplinary action. Besides the "substantial likelihood of material prejudice" test set forth in ABA Model Rule 3.6 (and applied by the Nevada Supreme Court in this case), the three other commonly applied tests are "clear and present danger," "serious and imminent threat," and "reasonable likelihood" of prejudice.

In *Markfield v. Association of the Bar*, 49 A.D.2d 516, 370 N.Y.S.2d 82, appeal dismissed, 337 N.E.2d 612 (1975), a New York court held that attorney comments on a judicial proceeding can be restricted only if they pose a "clear and present danger" to the fair administration of justice. In so doing, the court relied on decisions of this Court that have invoked that standard in reviewing contempt citations against *non-attorneys* for comments or publications relating to pending judicial proceedings. See *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Bridges v. California*, *supra*.

Some courts have required that attorney statements present a "serious and imminent threat" to the fair administration of justice. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 249; *In re Oliver*, 452 F.2d 111, 114 (7th Cir. 1971); *United States v. Garcia*, 456 F. Supp. 1354 (D.P.R. 1978); cf. *Levine v. United States District Court for the Central District of California*, 764 F.2d 590, 596-598 (9th Cir. 1985) (applying "serious and imminent threat" test in reviewing trial court "gag" order); *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970) (same). This standard derives from *Craig v. Harney*, 331 U.S. at 373, 375, in which the Court used the phrase "serious and imminent threat" interchangeably with "clear and present danger." Previously, in

Bridges v. California, 314 U.S. at 263, the Court described the "clear and present danger" test using the same phraseology. See also *Pennekamp v. Florida*, 328 U.S. at 334.

Most courts that have addressed the issue have held that a "reasonable likelihood" of prejudice to a fair trial is sufficient to justify restrictions on attorney comments. See, e.g., *Hirschkop v. Sncad*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Hughes v. State*, 437 A.2d 559 (Del. 1981); *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982); *Widoff v. Disciplinary Board*, 420 A.2d 41 (Pa. 1980), aff'd, 430 A.2d 1151 (Pa. 1981), appeal dismissed, 455 U.S. 914 (1982); *Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn.), cert. denied, 109 S. Ct. 3160 (1989); *In re Disciplinary Proceeding Against Eisenberg*, 144 Wis. 2d 284, 423 N.W.2d 867 (1988); cf. *United States v. Tijerina*, 412 F.2d 661, 667 (10th Cir.) (applying "reasonable likelihood" test in reviewing trial court "gag" order), cert. denied, 396 U.S. 990 (1969); *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973) (same); *People v. Dupree*, 88 Misc. 2d 780, 388 N.Y.S.2d 203 (Sup. Ct. 1976) (same).⁶ These courts rely to a considerable extent on the unique status of attorneys as "officers of the court" with a special responsibility to protect the administration of justice, and thus they find this Court's First Amendment decisions concerning restrictions on non-attorney speech inapplicable. See *Hirschkop*, 594 F.2d at 366; *In re Hinds*, 449 A.2d at 489. The courts adopting the "reasonable likelihood" standard also rely on this Court's statement in *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), that "where there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or trans-

⁶ The federal regulations governing the release of information relating to pending criminal proceedings by Justice Department personnel employ the "reasonable likelihood" standard. See 28 C.F.R. 50.2(b) (2).

fer it to another county not so permeated with publicity" (emphasis added). The *Hirschkop* court explained: "If remedial action is required on the basis of a reasonable likelihood test, * * * the rules for the avoidance of the harm must be considered under the same test. Implicitly * * * the Supreme Court must have approved the reasonable likelihood standard for the application of the preventive rules." 594 F.2d at 370.

As we have noted, the test applied in this case and the "serious and imminent threat" test are both equivalent to the "clear and present danger" standard. Some courts maintain that there is no significant difference even between the "reasonable likelihood" test and the variants on the "clear and present danger" test adopted by the remaining courts. See *Hirschkop*, 594 F.2d at 368; *Zimmerman*, 764 S.W.2d at 763; see also Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 Cornell L. Rev. 1106 (1980) (arguing that there is no significant difference between the tests). In any event, petitioner has in effect had the benefit of the "clear and present danger" standard, since petitioner's statements were found to create a "substantial likelihood of material prejudice" to the fairness of his client's trial. The outcome here thus does not turn on the legal standard applied; as a result, this case is not an appropriate vehicle to probe the outer limits of permissible state regulation of attorney speech.

3. The question whether the comments petitioner made at his press conference satisfied the "substantial likelihood of material prejudice" test does not warrant this Court's review. In light of the considerable publicity attending the case, the deliberate timing of the press conference for maximum impact, and the inflammatory nature of the comments themselves, it was reasonable for the Nevada Supreme Court to conclude that petitioner's comments met the standard set forth in Rule 177. Petitioner argues that the availability of remedies such as extensive jury voir dire, a change of venue, and post-

ponement of the trial reduced the likelihood of prejudice from his comments. The availability of those measures, however, does not preclude imposition of restrictions on attorney speech. See *In re Hinds*, 449 A.2d at 494-495 n.5; *People v. Dupree*, 388 N.Y.S.2d at 209. As this Court noted in *Sheppard*, 384 U.S. at 363, when it urged the adoption of regulations governing extrajudicial attorney statements, courts in criminal cases have an overriding obligation to "prevent * * * prejudice at its inception."

4. Nor is there any merit to petitioner's claim that Rule 177 is unconstitutionally vague. A statute or rule may be void for vagueness if it fails to give "fair notice to those to whom [it] is directed." *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950)). Statutes and rules must be framed in "terms susceptible of objective measurement," *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961), and be capable of being understood and applied by "the ordinary person exercising ordinary common sense," *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973). The Court has recognized that "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms' [because] [u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (footnotes omitted) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), and *Cramp*, 368 U.S. at 287)).

Petitioner argues that Rule 177 is vague in three respects. First, he contends that Section 2(d), under which it is ordinarily improper for an attorney to offer the press an "opinion as to the guilt or innocence of a defendant," is contradicted by Section 3(a), which permits attorneys to state "without elaboration * * * the gen-

eral nature of the claim or defense." Even if it had merit, however, this claim would not help petitioner, since the Nevada Supreme Court upheld the disciplinary action against him on the basis of Section 2(a) of the Rule, which covers comments on the credibility of witnesses, rather than on the basis of Section 2(d). In any event, it seems perfectly clear that an attorney can state the general nature of his client's defense without expressing an opinion as to its merits and his client's innocence. Nothing in the Rule bars an attorney from stating that his client denies the charges, which is quite different from vouching for his client's innocence. Although the prohibition against opinions on guilt or innocence is a "traditional ethical requirement" extending to the trial itself, *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 255, it has never been suggested that attorneys cannot effectively defend their clients without violating the rule.

Second, petitioner claims that Section 2(a) of the Rule, under which it is ordinarily improper for an attorney to comment to the press on the credibility of a witness, is inconsistent with Section 3(c), which permits an unelaborated statement that "an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved." The short answer is that nothing in Section 3(c) can reasonably be construed as authorizing comment on the credibility of witnesses. To be sure, in some cases even an unelaborated statement of the defense might tend to imply that the government's evidence should not be credited. But that is a far cry from directly attacking the credibility of individual witnesses, which is what the Rule prohibits. In any event, petitioner did not raise the alleged inconsistency between Sections 2(a) and 3(c) in the court below, and he has therefore waived that claim.

Third, petitioner argues that Rule 177 is unconstitutionally vague in that it permits an attorney to be disciplined not only when he knows, but also when he "reasonably should know," that there is a substantial likelihood that his comments will materially prejudice pending proceedings.⁷ That standard, however, is a very familiar one that is found in civil and criminal law. See, e.g., W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts* § 32, at 183-185 (5th ed. 1984); 1 W. LaFare & A. Scott, *Substantive Criminal Law* § 3.4, at 298 (1986); *id.* § 3.7, at 328-329. If the standard is not too vague to be employed against ordinary citizens in criminal and civil matters, surely it may be employed in disciplinary actions against attorneys, who are in a better position than ordinary citizens to shoulder the burden of inquiry it imposes. See G. Hazard & W. Hodes, *supra*, at 396.⁸

⁷ It is not clear whether petitioner also claims that the "substantial likelihood of material prejudice" standard is impermissibly vague. Suffice it to say that that test is no less self-defining than "clear and present danger" or any alternative formulation that has been upheld by the courts. It is expressed in straightforward language and requires the sort of objective measurement of factors bearing on the likelihood and degree of prejudice that attorneys, by training and experience, are fully competent to make.

⁸ Petitioner relies on *In re Keller*, 693 P.2d 1211 (Mont. 1984), where the court struck down a disciplinary rule regulating extrajudicial attorney statements. The court in that case, however, relied on the rule's failure to require any particular level of threatened prejudice before attorney statements could be restricted. Rule 177, by contrast, explicitly incorporates such a standard—that of "substantial likelihood of material prejudice."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

DOMINIC P. GENTILE,
Petitioner,

v.

STATE BAR OF NEVADA,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Nevada

**AMICUS CURIAE BRIEF OF
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 90-

DOMINIC P. GENTILE,
Petitioner,

v.

STATE BAR OF NEVADA,
Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of the State of Nevada**

**AMICUS CURIAE BRIEF OF
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 5,000 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in its House of Delegates.

The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, the NACDL has a vital interest in seeing that the proper balance is struck between the right to a fair trial and the first amendment rights of attorneys, a balance which affects not only litigants and lawyers, but the general public and our system of justice.

This case presents those issues in an unusually straightforward context with a clear record. For these reasons, NACDL appeared as amicus in the proceedings below and does so before this Court as well.

STATEMENT OF FACTS

The amicus NACDL adopts the statement of facts set forth in Petitioner Dominic Gentile's brief in support of the petition for a writ of certiorari.

ARGUMENT

I. INTRODUCTION: THE NEED FOR A DEFINITIVE AND UNIFORM STANDARD GOVERNING APPLICATION OF THE FIRST AMENDMENT TO ATTORNEYS' EXTRAJUDICIAL STATEMENTS

Attorneys, by virtue of the nature of their profession, are involved in matters of public concern and interest. The public nature and function of the justice system necessarily cast attorneys in the role of being spokespersons on matters of general community interest. Members of the bar are regularly called upon to provide information about the justice system and judicial process as well as specific litigation. Indeed, approved standards of professional responsibility for attorneys make such

a role entirely appropriate for members of the bar. See, e.g., Canon 8, "A Lawyer Should Assist in Improving the Legal System," ABA Model Code of Professional Responsibility ("Model Code"). Criminal defense attorneys are especially likely to find themselves fulfilling this function, since they are commonly involved in matters of intense public discussion and concern. Such a role is entirely appropriate, as it benefits the legal system and the general public. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976) (in reviewing constitutionality of restrictions on attorneys' extrajudicial statements, court notes that "... we must keep in mind that there are important areas of public concern connected with current litigation.")

An attorney's role as public spokesperson may arise in a variety of settings. Lawyers may be called upon, or find it appropriate, to provide information about the judicial system or process or particular issues which are addressed by courts. See, e.g., *Justices of the Appellate Division, First Department v. Erdmann*, 33 N.Y.2d 559, 301 N.E.2d 426 (1973); see also *Re Snyder*, 472 U.S. 634 (1985). Similarly, attorneys may be called upon, or find it appropriate, to make public statements concerning particular cases in litigation. See *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 253-54 (recognizing the legitimate reasons why a criminal defense attorney may find it appropriate to make public statements concerning a case in litigation).

Regardless of the particular context, an attorney fulfilling the role of public spokesperson will find himself or herself subject to numerous professional standards, codes and rules which circumscribe what they may say. Those standards, codes and rules provide different, often times conflicting and sometimes vague guidelines or commands to the attorney.

The existence of these different and conflicting standards has been attributed to the absence of clear guidance from this Court defining the first amendment rights of lawyers in the context of insuring litigants' right to a fair trial. See, e.g., *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325, 329 (W. Va. 1988). While some courts have bemoaned the absence of clear guidance from this Court, other lower courts, in adjudicating the validity of such disciplinary rules and standards, have attempted to discern this Court's position by relying on statements made by the Court in what are perceived to be similar circumstances. See, e.g., *Hirschkop v. Snead*, 594 F.2d 356, 369-70 (4th Cir. 1979) (en banc) (majority relies on this Court's statements in *Sheppard v. Maxwell*, 384 U.S. 333 (1966) to find that the "reasonable likelihood" standard of Disciplinary Rule 7-107, ABA Model Code, adequately protects first amendment rights of attorneys).

The existence of different, conflicting and sometimes vague professional disciplinary standards has unfortunate effects for lower courts, state bar disciplinary committees, members of the bar and the public. State courts, as well as federal district and appellate courts, are faced with legal challenges to disciplinary standards, which they must adjudicate in the absence of clear constitutional guidelines from this Court. The result is differing opinions as to the constitutionality of the same disciplinary standards. Compare, e.g., *Chicago Council of Lawyers v. Bauer*, *supra*, with *Hirschkop v. Snead*, *supra* (different opinions as to the constitutionality of the various provisions of DR7-107). Similarly, state bar disciplinary committees confront the difficulty of enforcing professional standards in the midst of disputed claims as to the legal validity of such provisions.

Lawyers are forced to act as public spokespersons at their own peril, unable to know with certainty what guidelines may be used to determine whether they have

engaged in professional misconduct. This problem is particularly acute for the ever-increasing group of attorneys whose practices extend beyond a single jurisdiction. For example, an attorney licensed in Illinois who is called upon to act as counsel in a matter in Virginia will find that his or her public statements are subject to conflicting standards. Moreover, given the conflicting and sometimes vague standards, as well as the different judicial opinions as to the legality of such professional standards, attorneys are unable to know with certainty what guidelines will be applied to their extrajudicial statements. This state of affairs also creates the possibility that disciplinary standards will be used, or perceived by the bar and the public to be used, in a discriminatory manner to harass attorneys who represent unpopular clients or causes. See, e.g., *Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137 (E.D. Va. 1976), *aff'd in part and rev'd in part sub nom. Hirschkop v. Snead*, *supra* (State Bar admits that the complaints brought against an attorney who regularly represented unpopular clients and causes "were meritless").

The upshot of this confusion and state of uncertainty is that attorney speech is chilled. As one court has recognized, "lawyers must restrict their speech 'to that which is unquestionably safe.'" *Hirschkop v. Snead*, 594 F.2d at 380 (Winter & Butzner, JJ., concurring and dissenting) quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The public, in turn, loses out, as it is deprived of information about its justice system and the beneficial effects that such information may have. See, e.g., *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 253 (recognizing the beneficial effect that statements by attorneys involved in criminal representation may have upon the political process of checking prosecutorial discretion).

All would benefit from a decision of this Court squarely examining the application of the first amendment to lawyer speech in the context of protecting litigants' right

to a fair trial. The need for a uniform national standard is paramount; and it can only be achieved through a decision of this Court. In recent years, the Court has been particularly active in examining and defining the legal standards that govern the ethics of lawyers as well as their first amendment rights. See, e.g. *Shapero v. Kentucky Bar Assoc.*, 108 S. Ct. 1916 (1988); *Nix v. Whiteside*, 475 U.S. 157 (1986); *Re Snyder*, 472 U.S. 634 (1985). The Court should continue to fulfill this important need by granting review of the petitioner's case.

II. THE PUBLIC ROLE OF THE BAR AND THE FIRST AMENDMENT

Attorneys occupy a unique role in matters of public affairs. Through their regular practice of law, attorneys participate in the raising and resolving of important public issues. The public contribution of lawyers, however, is not restricted to their courtroom duties. Historically, attorneys have been spokespersons on important societal issues even outside the courtroom. For example, while litigating the Scopes "monkey trial", Clarence Darrow and William Jennings Bryan, publicly debated the issues raised by the creationism law that was the subject of the trial. See Allen, *Bryan & Darrow at Dayton*, Russell & Russell (1925). This traditional role of members of the bar continues to the present, as lawyers are called upon, or find it appropriate to provide public statements concerning such public issues as the safety of asbestos, *Ruggieri v. Johns-Manville Products Corp.*, 503 F. Supp. 1036 (D.R.I. 1980), consumer products issues, *Widoff v. Disciplinary Board*, 54 Pa. Comm. 124, 420 A.2d 41, *aff'd*, 491 Pa. 129, 430 A.2d 1151 (1980), *cert. denied*, 455 U.S. 914 (1982), or the fairness of judicial proceedings involving allegedly political charges, *Re Sawyer*, 360 U.S. 622 (1959).

The public benefits from this spokesperson role of attorneys, as the public's knowledge of the judicial process,

both generally and in specific cases, is increased. As the drafters of the ABA Model Rules of Professional Conduct recognized, "there are vital societal interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." Comment, Rule 3.6, ABA Model Rules of Professional Conduct ("Model Rules").

Criminal defense lawyers, as a group, have an especially important role to play in fulfilling this function. Criminal prosecutions often involve important public issues which generate a great deal of interest and attention from the general community. See, e.g., "Adultery as a Crime: Old Laws Dusted Off In a Wisconsin Case," *New York Times*, April 30, 1990, p. A1. The public appropriately expects to be informed of these issues, not just through courtroom proceedings, but also through general public discussion, often guided by statements of attorneys.

Courts have recognized that public statements by criminal defense attorneys fulfill a variety of legitimate functions. See, e.g., *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 253-54. In fact, criminal defense lawyers may find it necessary to issue public statements concerning specific litigation to preserve and protect adequately the best interests of their clients. *Id.* (recognizing that criminal defense counsel may find it necessary to speak out during the investigatory stages of a criminal case to protect their clients or to make public statements to raise defense funds); see also American Lawyers' Code of Conduct, Chapter IX, Comment ("an accused may never be more in need of the First Amendment rights to freedom of speech than when officially labeled a wrongdoer before family, friends, neighbors and business associates. Many defendants are inarticulate; almost all need the special skills of a lawyer as spokesperson.")

One of the most important purposes that is furthered by public statements of criminal defense lawyers is to

better enable the public to function in its role as a political check on the significant discretion afforded prosecutors. See *Chicago Council of Lawyers*, 522 F.2d at 253 (recognizing that "[a]n important check on [a prosecutor's] use of . . . discretion is the political process. It is imperative that we allow as much public discussion as feasible about the way in which this authority is being exercised.") The importance of this function has increased in recent years, as this Court and others have exhibited increasing reluctance to police prosecutors' discretion through the judicial process of reversals or similar sanctions. See, e.g., *Wayte v. United States*, 470 U.S. 598 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); see also Easterbrook, *Criminal Procedures as a Market System*, 12 J. Legal Studies 289, 298-308 (1983) (arguing that the political process is the most efficient method for policing prosecutorial discretion); Vorenburg, *Decent Restraint of Prosecutorial Discretion*, 94 Harv. L. Rev. 1521 (1981). Moreover, given the ever present public concern with the operation of the criminal justice system, criminal defense attorneys are regularly called upon to provide the public with information concerning the general operation of the criminal justice process. See, e.g., *Justices of the Appellate Division, First Department v. Erdmann*, *supra*.

These incidences of extrajudicial statements by lawyers, whether about specific cases or the justice system generally, will undoubtedly increase as the media continues to expand its coverage of legal events. While fair trial rights must be preserved, it need not be done at the wholesale expense of attorneys' first amendment rights or the public's right to be informed of the functioning of its justice system. However, as long as the current state of uncertainty about first amendment rights of lawyers continues to exist, such speech will be chilled and the public will ultimately suffer the consequences of being less well informed. See Warren & Abell, *Free Press*—

Fair Trial: The "Gag Order," A California Aberration, 45 S. Cal. L. Rev. 51, 56 (1972).

III. THE CONFLICTING PROFESSIONAL DISCIPLINE STANDARDS

The current standards, codes and rules of professional discipline governing lawyers' extrajudicial statements present a confusing, often times conflicting and sometimes vague set of rules. This was not always the case. The first set of nationally recognized professional conduct standards, the ABA Canons of Professional Ethics, touched upon the subject of extrajudicial statements of lawyers only briefly, and then only contained the recommendation that attorneys "avoid" *ex parte* statements. See Canon 20, ABA Canons of Professional Ethics.

The genesis of the numerous and complex standards that now exist is generally agreed to be this Court's decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966). See Note, *Restrictions on Attorneys' Extrajudicial Comments on Pending Litigation—The Constitutionality of Disciplinary Rule 7-107*; Hirschkop v. Snead, 41 Ohio St. L.J. 771, 774 (1980) (hereafter "Restrictions On Attorneys' Extrajudicial Comments"). In reversing Sheppard's conviction due to prejudicial pretrial publicity, the Court issued an admonition: "we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Sheppard*, 384 U.S. at 362-63.

The Court's call to action was answered; both the lower federal courts and professional associations studied the problem of controlling prejudicial publicity of legal proceedings. These groups proposed various methods to address the problem; the methods proposed were focused, for the most part however, on the need to preserve the

right of litigants to a fair trial. See Advisory Comm. on Fair Trial and Free Press, *ABA Project on Minimum Standards for Criminal Justice*, Standards Relating to Fair Trial and Free Press (Approved Draft, 1968); *Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391 (1968). Those studies and their recommendations then formed the basis for the concrete action that is reflected in the current standards. While starting from the same place, the various bodies and groups which developed the specific standards now in existence have arrived at different destinations.

A. ABA Model Code of Professional Responsibility

The ABA Model Code addresses the issue of fair trial and extrajudicial statements of lawyers in Disciplinary Rule 7-107. The Model Code, which was adopted and is in effect in the majority of states, is most commonly associated with a "reasonable probability" standard; that is, lawyers are prohibited from making extrajudicial statements if there is a reasonable probability that such statements will prejudice the right to a fair trial. See Note, *Restrictions on Attorneys' Extrajudicial Comments*, 41 Ohio St. L.J. at 773-776.

In fact, DR7-107 creates a classification system of the types of statements by subject matter content that are prohibited according to the time at which they are made. Thus, subsections (A) and (B) of DR7-107 create *per se* subject matter categories of prohibited statements that vary according to whether the statements are made during the investigation stage (subsection (A)) or the time from the filing of a complaint, indictment or information until disposition (subsection (B)). Subsection (D), which governs the period from jury selection through trial and disposition, contains a "catchall" provision which, in part, prohibits statements concerning "other matters that are reasonably likely to interfere with a fair trial. . ." The final stage of the litigation pro-

cess, from disposition to sentencing, is governed by subsection (E) which prohibits an attorney from making any public statement "that is reasonably likely to affect the imposition of sentence." DR7-107(E).

The complex provisions of DR7-107 have been the subject of constitutional litigation. The two federal courts of appeals which have examined the constitutionality of DR7-107 in light of first amendment challenges, (the Seventh Circuit and the Fourth Circuit), both found infirmities in different provisions of DR7-107 but did so on different grounds, thereby further adding to the complexity and confusion. See *Hirschkop v. Snead*, *supra*; *Chicago Council of Lawyers v. Bauer*, *supra*.

B. ABA Model Rules of Professional Conduct

The ABA Model Rules, which have been adopted by a minority of states, address lawyers' extrajudicial statements in Rule 3.6, "Trial Publicity." Rule 3.6 adopts a "substantial likelihood" test—a lawyer is prohibited from making a statement about a case in litigation that is likely to be disseminated to the public and which the lawyer knows or should reasonably know "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule 3.6, Model Rules. In its original draft form, the Model Rules proposed a stricter standard—prohibiting only those statements that posed a "serious and imminent risk of prejudicing an impartial trial." *Model Rules of Professional Conduct* (Discussion Draft, 1980) ("Kutak Commission"), Rule 3.8.

The final approved draft of the Model Rules, which resulted in the adoption of the "substantial likelihood" test of Rule 3.6, differs in still other respects from Model Code DR7-107. Unlike DR7-107, Rule 3.6 does not contain any *per se* categories of prohibited statements. Instead, subdivision (a) of Rule 3.6 sets forth the general standard quoted above and subsection (b) then proceeds to identify subject matter categories of statements that

are presumed ("ordinarily likely") to create a substantial likelihood of materially prejudicing a criminal case or a civil matter triable to a jury. Rule 3.6, Model Rules. Model Rule 3.6 also differs from the comparative Model Code provision (DR7-107) by expanding the permissible subject matter categories of statements to include the general nature of a claim or defense in pending proceeding. Compare Rule 3.6(c)(1) with DR7-107(C). On the other hand, Model Rule 3.6 narrows the provision of DR7-107 by eliminating DR7-107(C)(7), which permits statements concerning seizure of evidence, and Rule 3.6 also narrows DR7-107 as it does not include the "catchall" provision of DR7-107(D). See Comment, Rule 3.6, Model Rules.

C. ABA Standards for Criminal Justice: Standards Relating To Fair Trial and Free Press

The ABA Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press (2d ed., 1978), differs from both the Model Code and the Model Rules as it adopts a "clear and present danger" test. See Standard 8-1.1, "Extrajudicial statements by attorneys." The original version of the Fair Trial and Free Press Standards contained a "reasonable likelihood" standard and also contained categories of prohibited statements according to subject matter, similar to DR7-107 of the Model Code. After the decision of the Seventh Circuit in *Chicago Council of Lawyers*, *supra*, the ABA commissioned a task force to study the need for possible changes in the Fair Trial—Free Press Standards. See Note, *Restrictions on Attorneys' Extrajudicial Comments*, 41 Ohio St. L.J. at 778.

The task force study resulted in the adoption of the second edition, and current version, of the Fair Trial and Free Press standards. As noted above, subdivision (a) of Standard 8-1.1 prohibits the dissemination of only those statements that "would pose a clear and present danger to the fairness of the trial." However, while sub-

division (a) contains this relatively simple and first amendment protective test, subdivision (b) proceeds to list six separate subject matter categories of statements for which "a lawyer may be subject to disciplinary action" and cautions that such discipline is still "[s]ubject to paragraph (a) . . ."

D. The American Lawyers Code of Conduct

The American Lawyers Code of Conduct ("ALCC"), which was developed by the American Trial Lawyers Association under the auspices of the Roscoe Pound—American Trial Lawyers Foundation, simply prohibits "engag[ing] in publicity regarding a criminal investigation or proceeding . . . until after the announcement of a disposition of the case." ALCC, Chapter IX, Responsibilities of Government Lawyers, Rule 9.11. However, this general prohibition, which contains three narrow exceptions, applies only to government lawyers. The comments to the Rule explain that the decision to place restrictions only on government lawyers was intentional, as the drafters recognized the important role that lawyers' first amendment rights can have in the effective representation of their clients.¹ See page 7 *supra*, quoting ALCC, Chapter IX, Comment.

CONCLUSION

This Court's call to action in *Sheppard v. Maxwell*, *supra*, was promptly responded to by the legal profession. The decision in *Sheppard*, however, only examined one

¹ The value and appropriateness of placing restrictions on extrajudicial statements only made by government lawyers has been recognized and advocated by others. See, e.g., *Chicago Council of Lawyers*, 522 F.2d at 253 (holding that the restrictions of DR7-107 should not be applied to criminal defense lawyers before indictment or other formal charges has been issued); Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stan. L. Rev. 607 (1977).

side of the issue—the need to preserve litigants' right to a fair trial. As a result, the various standards, rules and codes which have been developed since the decision in *Sheppard* have been developed without any guidance from the Court as to the proper role of the countervailing interest of first amendment rights of lawyers. This lack of guidance is manifested in the different, often conflicting and sometimes vague rules that now exist to circumscribe lawyers' extrajudicial statements.

It is now time for the Court to address the other side of the fair trial—free press problem, and to provide guidance as to the proper role and application of first amendment rights of attorneys. This case presents an appropriate opportunity for the Court to do so; the petition for certiorari should therefore be granted.

Respectfully submitted,

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No. 89-1836

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE,
Petitioner

v.

STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Nevada Supreme Court

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CERTIORARI GRANTED JANUARY 7, 1991

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DOCKET ENTRIES

March 8, 1988	Letter of Justice Cliff Young to Ann Bersi with Attachments Complaining of Gentile Press Conference
December 6, 1988	State Bar of Nevada, Southern Nevada Disciplinary Board, Complaint
January 13, 1989	Answer and Affirmative Defenses in Response to Complaint
February 1, 1989	Notice of Hearing
March 3, 1989	Amended Notice of Hearing
April 17, 1989	Hearing
May 12, 1989	Findings and Recommendations Issued
June 5, 1989	Notice of Appeal
February 21, 1990	Opinion of the Supreme Court of the State of Nevada

STATE BAR OF NEVADA
SOUTHERN NEVADA DISCIPLINARY BOARD

Case No. 88-43-82

STATE BAR OF NEVADA,
Complainant,
vs.
DOMINIC GENTILE,
Respondent.

FINDINGS AND RECOMMENDATION
FINDINGS OF FACT

The Respondent, Dominic P. Gentile ("Gentile") was retained to represent Grady Sanders in late 1987 in connection with alleged criminal activity by Mr. Sanders. Mr. Sanders was indicted by the Clark County Grand Jury on February 4, 1988 on charges relating to the theft of a large quantity of cocaine and travellers checks. On February 5, 1988—the day following the indictment of Mr. Sanders—Gentile held a press conference which was attended by members of the electronic and print media. A complete videotape and verbatim transcript of the press conference were introduced into evidence in this matter. At the press conference Gentile made the following statements:

(i) "... the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being levelled against him, but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Traveller's checks, is Detective Steve Scholl."

(ii) "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Traveller's checks than any other living human being."

(iii) "Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something."

(iv) "Now, up until the moment, of course, that [the other victims] started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them."

(v) "I think Grady Sanders was indicted because he—he was a scapegoat the day they opened the [safe-deposit] box."

(vi) "We've got some video tapes that if you take a look at them, I'll tell you what, he [Detective Scholl] either had a hell of a cold or he should have seen a better doctor."

Gentile knew that Detective Scholl would be a prosecution witness at Mr. Sanders' trial and he also believed that the "other victims" would be called as witnesses by the prosecution at that trial.

Gentile's admitted purpose for calling the press conference was (i) to counter public opinion which he perceived as adverse to Mr. Sanders, (ii) to attempt to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecution to poison the prospective

juror pool, and (iv) to publicly present Sanders' side of the case. As such, there was a substantial likelihood that the statements would materially prejudice the Sanders trial, which had been scheduled for August, 1988.

Prior to holding the press conference, Gentile conducted research on the question of what statements, if any, he was ethically permitted to make at the press conference. During the press conference, Gentile refused to comment on certain matters because he did not believe it ethically proper to do so.

On or about December 6, 1988 the State Bar of Nevada filed a complaint against Gentile alleging that the statements made by him at the February 5, 1989 press conference violated Supreme Court Rule 177. Gentile answered the complaint on January 13, 1989 denying that his actions violated the rule, and alleging several affirmative defenses.

CONCLUSIONS OF LAW

Supreme Court Rule 177 provides, *inter alia*, as follows:

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

* * * *

(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

The statements made by Gentile violated SCR 177(1), (2)(a) and (2)(d) in that they were statements which Gentile knew would be disseminated by means of public communication; which (i) related to the character, credibility, reputation and criminal record of witnesses in the trial of Mr. Sanders, and (ii) contained an opinion of the guilt or innocence of Mr. Sanders; and were known or should have been known by Gentile to have a substantial likelihood of materially prejudicing the Sanders trial.

SCR 177 does not violate either the United States or the Nevada constitution. The State Bar has not engaged in any unequitable conduct, nor has it applied SCR 177 in a selective manner.

Gentile's statements at the press conference went beyond the scope of the statements permitted by SCR 177(3).

RECOMMENDATIONS

The Southern Nevada Disciplinary Board recommends that Gentile be issued a private reprimand.

DATED this 12th day of May, 1989.

Southern Nevada
Disciplinary Board,
DONALD J. CAMPBELL
Chairman

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY
Chairman of
Disciplinary Panel

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[1] STATE BAR OF NEVADA
SOUTHERN NEVADA DISCIPLINARY BOARD

Complaint No. 88-43-82

STATE OF NEVADA,

vs.

Complainant,

DOMINIC P. GENTILE,

Respondent.

Taken at State Bar of Nevada

500 South Third Street

Suite 2

Las Vegas, Nevada 89101

On Monday, April 17, 1989

At 6:44 P.M.

[2] APPEARANCES:

For the Claimant:

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Las Vegas, Nevada 89101

For the Respondent:

NEIL GALATZ, ESQ.

Galatz, Earl, Catalano & Smith

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PANEL MEMBERS:

DENNIS L. KENNEDY, ESQ.

Chairperson

GABRIEL A. MARTINEZ, ESQ.

WILLIAM R. URGAS, ESQ.

LYNN M. HANSEN, ESQ.

DAN CASHDEN, Laymember

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[4] (Whereupon, Respondent's Exhibits A through E and State Bar Exhibits 1 through 3 were marked for identification by the court reporter.)

THE CHAIRPERSON: Go on the record. This is the time set for the hearing before the State Bar of Nevada, Southern Nevada Disciplinary Board, in Case No. 88-43-82 entitled State Bar of Nevada, complainant, versus Dominic P. Gentile, respondent.

My name is Dennis Kennedy. I've been appointed as chairman of the hearing panel. I would ask that the other members of the panel please identify themselves for the record.

MR. URG: William Urga, U-R-G-A, of the firm of Jolly, Urga & Wirth.

MS. HANSEN: Lynn Hansen of Jimmerson & Davis.

MR. MARTINEZ: Gabe Martinez of Greenman, Goldberg & Raby.

MR. CASHDAN: Daniel Cashdan, C-A-S-H-D-A-N, laymember.

THE CHAIRPERSON: Could we have counsel note their appearances, please.

MR. HOWE: John Howe, State Bar of Nevada.

[5] MR. GALATZ: Neil Galatz for Dominic Gentile.

THE CHAIRPERSON: And the record should also reflect Mr. Gentile is present. The record should also reflect that Mr. Gentile through his counsel has filed a memorandum in this matter. I have marked the original memorandum as having been received. Each of the members of the panel have also received a copy of the memorandum.

The record should also reflect that there was an amicus brief filed in this case by the National Association of Criminal Defense Attorneys on or about February 24, 1989, and I assume that all the parties have been provided with a copy of that brief. Is that correct?

MR. HOWE: You're referring to the amicus brief?

THE CHAIRPERSON: Yes.

MR. HOWE: Yes. I received a copy.

THE CHAIRPERSON: Before we begin, are there any matters that should come before the chair? If not, Mr. Howe, would you like to make an opening statement.

MR. HOWE: The matter here tonight involves a single count of alleged misconduct [6] based on statements made by Mr. Gentile to members of the press at a press conference held during the pendency of a criminal case in Clark County District Court involving prosecution of felony charges against Mr. Gentile's client Grady Sanders.

Mr. Gentile through his correspondence with this office and through his Answer has significantly narrowed the issues by admitting that he held a press conference relating to the Sanders case, that he made statements about the case to members of the press who were present.

He has provided bar counsel's office with a videotape of the entire news conference held at the time in issue here. We would offer into evidence the correspondence received from Mr. Gentile and the videotape supplied to us by him of the press conference and show that videotape in its entirety.

Based on that evidence, we will then ask the panel to decide what we believe is the only remaining contested issue, that being whether Mr. Gentile's statements were in violation of Nevada Supreme Court Rule 177 relating to trial [7] publicity. I'm ready to begin.

THE CHAIRPERSON: Mr. Galatz, would you like to make an opening statement.

MR. GALATZ: I think I'll reserve it.

THE CHAIRPERSON: Very well. Mr. Howe.

MR. HOWE: First of all, I've had marked a group exhibit. What's been marked as State Bar Exhibit 1 contains the pleading documents for the case including the Complaint, the first designation of hearing panel members, respondent's preemptory challenge, Answer and affirmative defenses filed by the respondent, notice of hearing, second designation of hearing panel members,

designation of witnesses and summary of evidence and the amended notice of hearing. That document's been marked as State Bar Exhibit 1 and I've provided a copy to Mr. Galatz and I would offer it as Exhibit 1.

THE CHAIRPERSON: Mr. Galatz.

MR. GALATZ: That's been stipulated to.

THE CHAIRPERSON: Okay. Very well.

MR. HOWE: I've also then had marked documents as State Bar Exhibit 2 and State Bar Exhibit 3. I've shown these documents to Mr. Galatz. What's been marked as State Bar [8] Exhibit 2 is the original of a letter on the letterhead of the law office of Dominic P. Gentile over Mr. Gentile's signature dated April 6, 1988, related to the grievance which gave rise to this proceeding and what's been marked as State Bar Exhibit 3 is a letter on the letterhead of the law offices of Dominic P. Gentile, Limited, over the signature of Dominic P. Gentile dated April 27, 1988, and related to the grievance filed which gave rise to this charge.

So I would offer then State Bar Exhibits 2 and State Bar Exhibits 3 at this time.

MR. GALATZ: Object, no foundation.

MR. HOWE: Okay. The, that being the case then I would ask that Mr. Gentile be sworn so I can question him about these documents.

MR. GALATZ: Object. He was not listed as a witness by Mr. Howe.

MR. HOWE: I don't believe that it's necessary for me to list him as a witness to have him sworn to ask him whether or not he received the documents receipted at this office over his signature.

MR. GALATZ: My understanding of the rules, Mr. Chairman, are that State Bar counsel is [9] obligated to supply a list of the witnesses that he's going to call in these proceedings. He has not listed any such witnesses. I don't know if I have the rule number but it's in the Supreme Court rules.

THE CHAIRPERSON: You're probably referring to Rule 105.2c.

MR. GALATZ: I believe that is correct.

MR. HOWE: The purpose of that rule is to make sure that there is full disclosure of discovery so that bar counsel is not concealing evidence from the respondent.

Certainly calling of a respondent would not be something—any evidence that would be adduced would not be something that would probably be concealed or which would be the basis of any denial of full disclosure or full discovery to the respondent.

I don't believe the rule applies to the calling of a respondent as a witness to identify the documents he sent to the State Bar.

THE CHAIRPERSON: Mr. Galatz?

MR. GALATZ: I don't see anything in there that says that anyone is exempt from it, party or non-party.

[10] THE CHAIRPERSON: The Chair agrees with Mr. Howe's interpretation of the rule. I don't think that there's any prejudice to the respondent by virtue of his not having been listed as a witness. So if Mr. Howe wants to lay the foundation to authenticate Exhibits 2 and 3, then he may do so.

MR. GALATZ: May I see the exhibits and maybe I'll save you the time in light of the ruling reserving my objection. They are his letters. We'll stipulate to that. That's reserving the objection.

THE CHAIRPERSON: Then Exhibits 1, 2 and 3 are admitted.

MR. HOWE: Both the documents marked as State Bar Exhibits 2 and 3 reference a videotape. Exhibit 2 states, I am in the process of obtaining a copy of the videotape made by the television station at a news conference you referenced in your letter of March 29, 1988. Since the videotape is a complete record of what I said, I am sure the tape is much better than anything I could put in writing. I should have a copy of the tape within a week and will send it to you for your review.

[11] Paragraph 2 of exhibit, State Bar Exhibit 3, the letter of April 27th, second paragraph states, turning to

the substance of the grievance, as is often the case the print media was selective in reporting what I said at the press conference. Additionally at least one of the papers was less than wholly accurate as to what I said and having hand delivered to you concurrently a videotape copy of the entire press conference I have marked it as, quote, respondent Gentile's Exhibit A, close quote. I ask that you view this tape and make it part of the permanent record.

(Whereupon, State Bar Exhibit 4 was marked for identification by the court reporter.)

I've had marked as State Bar Exhibit No. 4 the original videotape bearing the marking respondent Gentile's Exhibit 4 which was received at this office along with Mr., [sic] the letter from Mr. Dominic P. Gentile on April 27, 1988. I would offer that videotape into evidence and request permission of the chairman to show the tape at this time.

MR. GALATZ: We'd object to it for lack of [12] foundation and for the fact that Mr. Howe has just testified as a witness.

THE CHAIRPERSON: I think what we will have to do before we can rule on the admissibility of the tape is we're going to have to see it to see if in fact it is what it purports to be, Mr. Howe, so you do have permission to play it and once it has been played, we'll take up the question of its admissibility.

(Whereupon the videotape marked as State Bar Exhibit No. 4 was played.)

THE CHAIRPERSON: Having now played the tape, Mr. Howe, do you want to renew your effort to admit the tape?

MR. HOWE: I would once again offer the videotape bearing the marking respondent Gentile's Exhibit A and which has now been marked as State Bar Exhibit No. 4 as State Bar Exhibit No. 4.

MR. GALATZ: Objection, lack of foundation and Mr. Howe has testified as to foundation when he's not a listed witness.

THE CHAIRPERSON: Unfortunately Mr. Howe did have to give some evidence as to the foundation for the tape because it was presented [13] to him. Again, I don't think that the lack of listing Mr. Howe as a witness in this matter has prejudiced your client. The respondent did provide the tape directly to Mr. Howe and it would not, is not surprising Mr. Howe would have to offer by way of testimony or simply a representation as to how he came into possession of the tape.

In light of your objection as to foundation, perhaps Mr. Howe would want to place Mr. Gentile under oath and ask him some questions about the tape, about providing it, whether or not it's the same, et cetera, et cetera. Perhaps that would eliminate the foundational problems that you're indeed raising.

MR. GALATZ: Again we would object that Mr. Gentile was not listed as a witness.

THE CHAIRPERSON: Okay. The Chair has already ruled on that point. Your objection is noted. Mr. Howe, in order to address the foundation questions you may go ahead and have Mr. Gentile authenticate the tape if you'd like to do so.

MR. URGAS: Has he been sworn?

THE CHAIRPERSON: No. He's going to be [14] sworn right now.

DOMINIC PASQUALE GENTILE,

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. HOWE:

Q. Would you state your name, please.

A. Dominic Gentile.

Q. Mr. Gentile, are you an attorney licensed to practice law in the State of Nevada?

A. Yes.

Q. How long have you been so licensed?

MR. GALATZ: Excuse me. We're now going beyond the scope of foundation that you said you would allow him to go into.

MR. HOWE: I'm just identifying the witness.

THE CHAIRPERSON: I think he can go ahead and just try to limit the scope of your [15] introduction to just get right to the authentication if you would.

MR. HOWE:

Q. Are you the respondent in this particular proceeding?

A. Yes, I am.

Q. Okay. And did you receive notice from me as bar counsel that there was an investigation underway of a press conference that you had held regarding the Grady Sanders case?

A. I received a letter and it bore your name. I assume that you sent it to me.

Q. And did you respond to that letter by sending the two documents that have been marked as State Bar Exhibits 2 and 3?

A. Yes, I did.

Q. Directing your attention to State Bar Exhibit No. 3, the reference in there to respondent Gentile's Exhibit No. A referring to a videotape, did you send a videotape along with that letter—

A. Yes.

Q. —when you sent it to my office. And did you mark that videotape [16] respondent Gentile's Exhibit A?

A. I don't remember but the letter says that I did so I must have.

Q. I'd like to show you what's been marked as State Bar Exhibit No. 4.

A. That's my handwriting. Well, wait a minute. I don't think that the last line that says approximate

running time 15 minutes. I don't think that's my handwriting but the two lines above that are.

Q. Okay. The two lines that say respondent Gentile's exhibit single quote A single close quote and grievance No. 88-43-82 is your handwriting?

A. Uh-huh, yes.

Q. The videotape that you sent along with the letter with that reference on there, was it a tape you had obtained of the news conference you held in the Grady Sanders case?

A. Yes.

MR. HOWE: I'd once again offer what's been marked as State Bar Exhibit No. 4.

MR. GALATZ: Same objections.

MR. URGAS: The tape that was played, was that the tape you sent to him? The one we just [17] saw?

THE WITNESS: To answer that question yes or no I don't know that I could but it's certainly not worse than a copy of a tape I sent.

THE CHAIRPERSON: Are the events that were depicted on the tape a true and accurate record of your statements and the statements of other unidentified persons that were made at the press conference that you held?

THE WITNESS: Yes, a few things happened before it and a few things happened after it that I don't know if they're of any significance but in terms of what was on the tape, that is not accurate.

THE CHAIRPERSON: The tape has not been edited. The tape is complete.

THE WITNESS: Not that I know of. I obtained the tape from a television station so I can only tell you that I tendered the tape as I received it. I think I made a copy. I'm sure I did because I wanted one for myself. Whether it was edited or not I really would have to say I don't know. Okay? But to tell you that I remember vividly everything that was done during that conference, that would be a lie.

[18] THE CHAIRPERSON: Mr. Galatz, are you going to renew your objection?

MR. GALATZ: Same objection for the record.

THE CHAIRPERSON: The tape's admitted, Exhibit 4.

MR. HOWE: I have nothing further to offer. The State Bar would rest.

THE CHAIRPERSON: Mr. Galatz?

MR. GALATZ: Move to dismiss the charges on the basis that the case as presented fails to establish a violation of the rule. Excuse me. May I get a drink of water? This throat is—

THE CHAIRPERSON: Yes. We're off the record for a moment.

(Pause in proceedings.)

MR. GALATZ: The rule I would submit is unconstitutional as is set forth in both of the briefs that have been filed. The statements do not violate the rule if you think the rule is constitutional on its face. We would move to dismiss.

THE CHAIRPERSON: The Chair will take your arguments under advisement, Mr. Galatz, but for the time being they're denied. You can make your [19] opening statement if you wish to do so.

MR. GALATZ: We have a lot of witnesses waiting so it will have to be very, very brief. Basically we're going to call several witnesses. They're all lawyers. One of them is Brian Greenspun who is, as you are aware, a member of the press; another is Janet Rogers who is connected with the television media.

They will both speak to the issues of press coverage of criminal matters, how the press secures information, the natural prosecution bias that is built into the information sources they have, the fact that the press coverage has a definite effect socially, economically, both adversely on an accused in a criminal matter, that they both as lawyers and members of the media recognize

this problem and recognize that a lawyer does not just represent a client in a courtroom but has an obligation to speak for the client to prevent the client's social and economic life and that of his family from being ruined during the time period that the coverage is going on on the potential trial.

They will also based upon that rule be tricks of the voir dire pointed out that [sic] [20] it's their opinion but again as members of the press and experienced lawyers that there was no prejudice on the jury as a result of any statements by Mr. Gentile and as you see from Exhibit A there is a mass of media coverage that inundated and surrounded the entire proceedings and there is no segregation of that.

There are only one of those multiple things being the press conference in issue out of a welter of media coverage that's summarized for you in Exhibit A. Other lawyers that will testify are Ed Kane and Dan Markoff. Again, I don't think you need introductions to them, at least the lawyer members.

Ed Kane was formerly with the U.S. Attorney's office. David Markoff has served as federal public defender. Both have handled many, many criminal cases and both again as attorneys are experienced in this matter will point out the prosecution bias of the press, the need for the lawyer to step forth in discharging his obligations to his client and defend him in the press long before you ever get to the courtroom and that again the press conference in their opinion had no effect on the adverse effect [21] on the jury selection or jury voir dire in this case.

Obviously Mr. Gentile will testify he has reasons and motives that are essentially along the lines as I indicated the other witnesses will.

I would ask your permission to take Mr. Greenspun out of order because he indicates he has another commitment and I sort of tried to promise him that we'd get

him out as quickly as possible so it may be a little out of sequence but if we can I'd like to do him first.

THE CHAIRPERSON: That's fine.

MR. GALATZ: Okay.

BRIAN LEE GREENSPUN,

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GALATZ:

Q. Will you state your full name for the record, please.

[22] A. Brian Lee Greenspun, G-R-E-E-N-S-P-U-N.

Q. Mr. Greenspun, will you tell the panel please your educational background.

A. I went to college, Georgetown University, graduated law school Georgetown University, I think that's it, my formal education.

Q. What bars are you admitted to practice before?

A. California and Nevada.

Q. When did you get admitted in Nevada and California, sir?

A. 1971 or '72. I think it was the end of '71, beginning of '72.

Q. What has your experience been in the practice of law as it relates to the criminal field?

A. I practiced, actively practiced in Nevada from 1972, the beginning of '72 until somewhere near the end of '75 I believe. And did some civil work '75, '76-ish on an active basis then I left the active practice or the full time practice of law.

I have been an alternate [23] juvenile referee and a North Las Vegas Municipal Judge alternate since that time and spend maybe ten hours a year sitting, 12 hours a year sitting in each one of those capacities but in terms

of the active practice for the most part I gave up full time practice in about '76.

Q. What criminal law experience have you had?

A. I was with the public defender's office for about two years and then on my own with another lawyer where I practiced criminal law for another year and a half after that.

Q. What has been your experience in the newspaper business?

A. I—well, I've worked for a couple of newspapers prior to coming back to the Las Vegas Sun in 1975 or '6 and I left the full time practice of law whether it was '75 or '76 whenever that was I had been with the Las Vegas Sun ever since.

Q. What is your position and title at the Sun now?

A. I am currently president and associate editor of the Las Vegas Sun.

Q. Are you familiar with the way [24] newspapers gather information on criminal cases?

A. I believe so, yes.

Q. Could you tell the panel how this is done and what bias, if any, this results in the system?

A. Well, there are a number of—there is [sic] many ways of gathering news on the criminal justice system as there is imagination but generally the reporters have access to the figures for one in the Clerk's office. They have access to the lawyers generally on either side. They have access to the court personnel. When I say access, they know them and they talk to them. Whether they get answers depends on the particular lawyers in the case at hand.

Of course there's always the court watchers they have access to and they have access to, well, as I said court personnel, bailiff, other lawyers who watch cases, jurors, and they set about depending on the kind of case if they're very interested in it they will dig and they will read through files. They will talk to as many of the lawyers involved as they can. They will go to the police

departments, District Attorney's office, the investigators and they will [25] do their research that way.

Now, depending on how important the case is sometimes it's not a real important case it's just a matter of getting it down for the record they'll rely on what's filed in the house or what they hear. Assuming a case such as Grady Sanders where there obviously has been notoriety what type—that was a high profile case and usually the reporter or reporters assigned to that case will do as in depth a review or get as much as they can on that particular case because of the kind of notoriety. Frankly it's the stuff of which good stories are made.

Q. These good stories that are made, what are the sources that wind up being used in a Grady Sanders type case?

A. Well, in this particular case I can't specifically tell you all the sources but the kinds of sources would be police, investigators, D.A.'s, people who worked at the vault company, friends of friends who knew friends, you know. I mean wherever you can get them.

Q. Is there evidence that develops in the presentation of this type of a high profile [26] case?

A. Well, there's no question about it. There's an imbalance in most criminal cases.

Q. What is the imbalance and how does it occur?

A. The imbalance is the access to information. Most reporters have a greater access to the Police Department than they have to defendants. Either defendants are told by their lawyers not to talk or the lawyers aren't talking or they can't get that kind of information from other sources and they turn around to the police.

They have the files, the policeman's name, the reports and frankly in the last 15, 20 years or so there's been—I don't know if it's a change but certainly a highlighted effort by the police agencies all across this country to emphasize the good work they're doing and they do that in any number of ways. Any way they can get it disseminated.

They want the voters who vote on their bond issues and vote on their salaries and vote for their Sheriffs in whatever communities they want them to know all their good works so it's almost part of the system that they [27] want that stuff disseminated and they find reporters who are willing to tell that story and people who read newspapers and watch TV want to know those kind of stories.

We all grow up respecting the Police Departments of our communities and we like cops and robbers stories and so we like to read it and so the newspapers appear I'm sure the other media go out of their way to find those kind of stories and it just so happens at least from my experience that access to that kind of information is much more readily available from the police side.

Q. You've looked over the clippings in the Grady Sanders case, Exhibit A. Does that appear to be what occurred here?

A. Exhibit A is—show me—are those the stories?

Q. Yes.

A. Yeah, yes. No question about it.

Q. This loading of information towards the prosecution side, what effect does this have on the accused in a criminal case? I'm not even to the trial stage. I'm talking about [28] how it effects him before you even get to trial if at all in your experience.

MR. HOWE: I want to object. I don't know that this witness has any special qualifications to answer that question unless he can testify about what effects the news coverage might have on the defendant and so I think it's an improper question and I would object to it.

THE CHAIRPERSON: You object to the lack of foundation?

MR. HOWE: Yes.

THE CHAIRPERSON: Okay. That objection's sustained. You can lay the foundation if you'd like to.

MR. GALATZ: Okay.

Q. Have you had occasion both as a newspaper man and as an attorney handling criminal matters to observe and see the effects on a person who is accused with this type publicity?

A. Oh, yes, many times.

Q. And on the Grady Sanders case were you able based on materials you saw able to arrive at any opinions or conclusions concerning the possible and potential effects on him?

A. Yes, yes.

[29] Q. What are the effects on the accused in this specific case and in general?

A. I don't think they're a lot different.

MR. HOWE: I would like to renew my objection. I think the question is improper and it is essentially opinion evidence with no proper foundation as to why this witness should be more qualified to offer his opinion than the panel to form their own opinions so I object to the line of questioning in a particular question.

MR. GALATZ: The witness presents a unique combination of experience. He presents experience not only as an attorney handling criminal matters but as a newspaper man who is involved with the dissemination of the information and the results of the dissemination.

THE CHAIRPERSON: The Chair will admit the testimony but it seems to the Chair that it's of perhaps marginal relevance but I'll go ahead and admit it.

THE WITNESS: I started to say it's not that much different from most people whose—about whom stories appear in the newspaper in a negative light. It's just that [30] much worse because there's a criminal stigma attached to it. You've got kids at school who take a beating. You've got wives and other family members who take a beating as a result of the stories. You've got a social stigma that attaches to the accused, if you will, wherever he goes and you have people forming opinions and talking about it in groups like this or cocktail gatherings because of what they've read or see on TV.

It happens all the time and I get those people in my office all the time not just accused but it's that much worse when someone is held up that kind of scrutiny with a criminal charge against him and it's something that I have to deal with every day whether or not to even publish stories 'cause we try to look at the kind of harm it does to the people and their families.

Now, many times the news value outweighs that. Most times it outweighs it but every once in a while there are decisions made to hold it because the harm to the individual is much greater than the public good that's derived from printing the story so I'd say certainly in the Grady Sanders case, I mean this is one of the most notorious stories of this type in the last few [31] years.

There's no question. I mean I know personally the kind of ridicule Grady Sanders took because of the stories. Forget what happened once he went to court.

MR. GALATZ:

Q. What obligation does this impose upon an ethical criminal defense lawyer representing a man like Grady Sanders where there is this kind of pretrial publicity?

A. In my—

MR. HOWE: I want to object to that question as well. There's absolutely no foundation for this witness to testify about what obligation may be upon the defense counsel to respond in this case.

THE CHAIRPERSON: Well, go ahead, Mr. Galatz.

MR. GALATZ: I think again that the witness is qualified as an expert in the area of criminal law and in press coverage both. I believe that the charge in this case is based upon an assumption that there is something inherently wrong with speaking to the press and that there's some sort of fashion in saying that if you speak [32] to the press you've done something wrong.

Every case that's been cited in the briefs says you go beyond that and you have to look to see what the real world is and what the effects of these indictments and

accusations are on the accused. Indeed the language quoted in both briefs—one of the points made by the courts in striking down the rules of this type has been the fact that the accused is held up to social, economic disparagement and that he needs and indeed the lawyer is obligated to step forward and speak for that person by virtue of his better training and by virtue of the fact that he is in a position to meet the publicity problems that have surrounded the case and of the imbalance that exists because of the police bias, by the news gathering sources must be met by the lawyer and again it's not improper law but it is proper evidentiary information that the law is before the record.

THE CHAIRPERSON: That may be the case but the objection is going to be sustained. The reason for the ruling is that the attorney's obligations under the rule whether they be to come forward or to remain silent is a matter that the [33] panel has to decide and we don't need to have expert testimony on what those obligations are. We'll have to decide what the rule says and what it means.

MR. GALATZ: For the record we would like to make an offer of proof then indicating that the obligation of the attorney would be testified to by this witness to meet the problems that are created for the client by the press coverage in meeting social and economic disadvantages that he's placed in.

THE CHAIRPERSON: Very well. That's your offer?

MR. GALATZ: That's correct.

Q. You've reviewed the voir dire examination which is Exhibit C in its entire transcript and B has the excerpts. Based upon your examination and again upon your experience as a criminal defense lawyer—

THE CHAIRPERSON: Excuse me. I don't know that those have been admitted.

MR. GALATZ: Those were stipulated to.

THE CHAIRPERSON: Have we got those in the record that they were in. Okay. Very well. I'm sorry.

[34] MR. GALATZ: I'm sorry. We did that before you came in.

MR. HOWE: It probably should be formally offered and admitted for the record.

MR. GALATZ: We would for the record move the admission of A through E of the respondent's exhibits.

MR. HOWE: No objection.

THE CHAIRPERSON: Then Exhibits A through E of the respondent's exhibits are admitted.

MR. GALATZ: Thank you.

Q. Based upon the review of the transcripts of the voir dire which full transcript is in Exhibit C I believe it was and B is the excerpts dealing with the question of press coverage, do you have an opinion as to the effect of the press coverage resulting from Dominic Gentile's statement upon any of the jurors and specifically whether or not the press coverage given by Mr. Gentile materially prejudiced the jury?

MR. HOWE: I want to object to the question on lack of foundation. I don't believe that there's any way it's been established that this witness would have a basis for rendering such [35] an opinion.

THE CHAIRPERSON: Mr. Galatz?

MR. GALATZ: The witness has reviewed the transcript of the voir dire selection of the jury pertaining to these portions of the issue of voir dire. The witness again has several years of experience as a criminal defense lawyer. I submit that he is an expert based upon the review of this specific transcript of the selection of the jury can render an appropriate opinion. [sic]

THE CHAIRPERSON: The objection will be overruled. The witness can testify.

THE WITNESS: If I remember the question the question was did I find anything in voir dire that indicated that the jury was adversely affected or prejudiced by the press conference.

MR. GALATZ:

Q. That's correct.

A. I found nothing in here, absolutely nothing, surprisingly but that's the way juries are. They answer truthfully. They didn't—what I saw in here is they weren't effected in the slightest.

Q. Mr. Greenspun, you've looked at Exhibit E which is Rule 177.

[36] A. Yes.

Q. What is the relationship of that rule to the application of the first amendment? And I'm asking for your view as a newspaper man right now.

A. I have to say that this rule is—

MR. HOWE: Excuse me. I want to object because I'm not sure I understand the question. If the question is if he's asking whether or not this rule violates the Constitution, then I think that's an improper question and I want to object to it on that ground.

That's an issue that would have to be decided by a court of law applied to the Constitution and there's no foundation for this witness to testify and it's not relevant to these proceedings to get this witness's opinion as to whether or not that rule is constitutional or unconstitutional.

THE CHAIRPERSON: Mr. Galatz?

MR. GALATZ: Whether a rule is constitutional or unconstitutional is not something that is decided in a vacuum. The rights to freedom of the press and free speech are rights [37] that have to be balanced against a world where many things are occurring.

You don't simply say that we take something without any factual background and decide that it is or isn't constitutional. You have to relate the language to the circumstances.

We all would agree yelling fire in a crowded theater in the dark is probably something that can be properly prohibited. What the effect of a rule like this is as it relates to the type information we're dealing with here

where there is allegations of public misdeeds, misdoing, misconduct, and the rights to freedom of the press are clearly things that have to be weighed in determining the constitutionality of this rule. That again is addressed in the cases that are cited in the briefs.

I would suggest that foundation evidence supporting that material is totally admitted and totally proper and comes via the expertise and experience of somebody in the newspaper business and double in this instance because of criminal lawyer experience.

MR. HOWE: My point is that the witness's opinion as to whether not this rule is [38] constitutional or unconstitutional is totally irrelevant. We could call in a thousand witnesses all who testified that in their opinion this rule is unconstitutional and that is not evidence the rule is unconstitutional. It's got to be decided by the Court deciding rules of law. It's not a matter for opinion evidence.

THE CHAIRPERSON: Mr. Greenspun's opinion, if that's what he was going to give, as to the constitutionality of the rule, of course, is inadmissible. As I understood it from your comments, Mr. Galatz, you were going to focus on something else other than his opinion as to the constitutionality so I would just ask in light of the ruling to go ahead and rephrase the question if you would.

MR. GALATZ:

Q. What is the effect of Rule 177 on the rights to free press?

A. In my opinion if I were sitting in my editorial board looking at this particular case and trying to judge whether or not it's appropriate for a newspaper to take a position on the criminal justice system in Nevada and the way it is operated vis-a-vis these rules in this [39] particular case it would be my opinion, and there's no question it would be my opinion, that if a lawyer did not do everything he could possibly do to level out the playing field of pretrial publicity, he would be derelict in

his responsibility and he would not be doing or upholding his oath that says I will protect my client's rights to the fullest.

If he were to allow the continuing leaks mostly in this case mostly from the prosecutor's side to poison, if you will, the environment of potential jurors, to poison the school yards, to poison the grocery stores or the social clubs or wherever the families hang out, he would be derelict in that responsibility because that's part of protecting his client's interests and in our editorial board that's the kind of issue—this is the kind of issue that's very, very ripe if he didn't do in my opinion what he did if that answers your question.

Q. There are allegations of police misconduct. What is the role of the press and the lawyers involved in the case when it comes to serious allegations of governmental misconduct?

A. That is our rason detra [sic] as they [40] say. That's why newspapers and television stations and radio stations exist. That's why the first amendment is here. The government is our servant. We are supposed to report on what our government does in our name and fortunately or unfortunately we don't—you know, we're not clairvoyant and we're not all knowing.

We can't see the future. We can't see the past often and we have to rely on people who are involved daily in these incidents to let us know what our government is doing in our name and I think it's our obligation once we hear it to pursue it and frankly I think it's every citizens' obligation if they see something that our government is doing wrong to bring it to light.

Just like—maybe it's a little off the subject but President Bush's signing the whistle blower law. It's the same thing. You've got to reward citizens for reporting malfunctions or misfunctions in the government and I think lawyers are as much citizens as everybody else or should be.

MR. GALATZ: Excuse me. May I just consult with my client since I have the unique [41] privilege as a lawyer.

No further questions.

THE CHAIRPERSON: Mr. Howe, cross-examine.

CROSS EXAMINATION

BY MR. HOWE:

Q. Mr. Greenspun, did you attend the press conference in question here that Mr. Gentile held regarding the Grady Sanders case?

A. No, I didn't, but I saw the tape.

MR. HOWE: Okay. That's all the questions I have.

THE CHAIRPERSON: Redirect?

MR. GALATZ: No.

THE CHAIRPERSON: Can the witness be excused?

MR. URGAL: Can we ask questions?

THE CHAIRPERSON: Sure. Go ahead, Bill.

MR. URGAL: I have several questions.

EXAMINATION

BY MR. URGAL:

Q. Mr. Greenspun, first of all you've talked about poisoning the atmosphere. Did [42] you see any evidence that this case was poisoned in any way?

A. You mean from the transcripts or prior to?

Q. No. From the evidence that you've reviewed.

A. Oh, absolutely.

Q. What evidence did you review that show there was poison?

A. When I look at poison I look at the kind of news stories that were run.

Q. I didn't ask you that.

A. Well, that's what I'm asking you if it's a trial.

Q. No. You looked at a bunch of documents and you talk about poison but I don't see that you've referred to

any documents that show poison. In fact you commented the other way.

A. No. That question was, Mr. Urga, the voir dire was the jury—was the jury prejudiced or did it appear prejudiced and I said no, not from the answers they gave on voir dire. If you mean by poison was the general public poisoned, if you will, I don't know about [43] that term, poisoned toward Grady Sanders based on all those stories that were run clearly they were.

Q. Now, you're not saying your newspaper is biased?

A. Of course not. We have an inherent bias.

Q. Towards the police then I take it?

A. Absolutely, absolutely. We don't—it comes out that way. In reality we don't have any. I mean I don't have one but the nature of the stories and the sources of the stories and the kinds of stories that we run there is an inherent bias, yes, in all media in my opinion.

Q. And do you know Mr. Sanders?

A. I know Mr. Sanders.

Q. And you said he had problems I take it?

A. Oh, yeah.

Q. What problems did he have that you know personally?

A. He was—I mean he's a big Rebel booster, okay? He used to go to all of the basketball games. He was ashamed to go to [44] basketball games. He wouldn't go. The ridicule, the questions he had to go through, "Did you do it? Why did you do it?" The kind of looks he got. He happened to be a client of my wife on the business that she's involved in and she was telling me too what's, you know, poor Grady.

Now, I don't know Grady that well that I could tell you that it effected him deep down to his soul but it's the kind of effect that I see on a number of people who are the subject of adverse publicity. They're afraid to go out of their house half the time.

Q. And do you feel that if Mr. Gentile or any other attorney then is allowed to state his side of the case, that somehow changes it?

A. I feel that if the prosecution is allowed to state their cases the way they do, that somebody has to get up there and speak for the defendant to even it out. I don't believe frankly that either one should do it but if one's doing it, you can't do it in a vacuum. You have to get out there and level the playing field for your client.

Q. So you would be in favor of a [45] total lack of comment from either side?

A. As a lawyer. As a newspaper man I'm all for comment from everybody but if you're talking strictly as a lawyer I think the cases should be tried in court but in the last two or three decades cases are not tried in court. Many of these high profile cases are tried in the public arena long before they ever get to court.

Q. What comments do you know of that the prosecution, we'll use that term, generally made that were in violation of Rule 177?

A. Oh, I don't know any specifically that were in violation of the rule. The fact that they comment. The fact that—the issue is on all three stories that I read and about, you know, what—not just what Grady Sanders was charged with but that, you know, the cops passed a polygraph, things like that. These are—I don't know if they're leaked at the prosecution.

I look at the prosecution as everybody on the other side of the bench, on the other side of the aisle so that includes the police, the investigators and everybody else. Those stories came from somewhere. Our reporters [46] can't make those stories up and I kind of doubt that those stories would come from the defense because they were pro prosecution stories so my hunch is that they came from the prosecution side whether that's the police or the District Attorney or whoever and those stories laying bare long before you ever get to trial do as much

or more harm to the individual and his family without being addressed and I think—

Q. Do you believe that the defense attorneys are prohibited from saying anything?

A. No, I don't believe they're prohibited from saying anything. I think the way sometimes the rules are interpreted what they say chills them so—what they can get in trouble for chills them enough that they're afraid to say what they should say.

I think these specific rules, Rule 177 to a certain extent chill lawyers. I watched that tape and I saw Dominic say that he read the rules and he read the law the night before and there was only so much he could say and there was so much that he couldn't say so what he was going to say was within the rules, was in his opinion what he thought was within the rules.

[47] Now he's sitting here within this group because what he said wasn't within the rules or at least somebody thinks it wasn't within the rules. Now, if he's to take that position and the next guy says I read the same rules and laws Dominic says but I can't say what Dominic says that chills the next lawyer down the road.

MR. URGAS: I have nothing further.

THE CHAIRPERSON: Do any of the other panel members have questions? Does counsel have no further questions?

MR. GALATZ: I have a question or two.

REDIRECT EXAMINATION

BY MR. GALATZ:

Q. The statements attributed to the Metropolitan Police about the polygraph being taken and passed by the officers, is that a proper statement of evidence that could go into a courtroom?

A. You're asking me this?

Q. Yes.

A. Not the way I understand the law.

Q. And is it proper for Sheriff [48] Moran to give character evidence as to his police officers?

MR. HOWE: I'm going to object.

THE WITNESS: I don't know.

MR. HOWE: I think we're questioning stating as facts not to evidence in the question. I'm not—

MR. GALATZ: They're in Exhibit A in the articles.

THE CHAIRPERSON: Is there an exhibit?

MR. GALATZ: Exhibit A contains the facts that the officers passed the polygraphs and that Sheriff Moran thinks that detectives are wonderful men and we stand behind them and how honest and wonderful they are.

Q. Are those proper statements to go into court?

A. Well, if Sheriff Moran were to say that in court—I don't know. It depends on the judges around here but I think whenever Sheriff Moran gives his opinion on his police officers that goes a very long ways. He's a very popular sheriff. He's not going to lie to the people. They've elected him by outrageous mandates and he's not going to do anything but [49] tell the truth and, you know, that's very damaging to the other side.

Q. It's a fair statement by defense counsel "My client is innocent" and remember the presumption of evidence is that a sufficient statement to protect his client in view of the press coverage reflected in Exhibit A?

A. If it were me I'd have said a whole lot more. He felt constrained to say only that.

MR. GALATZ: Thank you. Nothing further.

EXAMINATION

BY MR. URGAS:

Q. Carrying it one step further, Mr. Greenspun, do you have Exhibit E. That's the Rule 177.

A. I had it here someplace. Yes, sir.

Q. Tell me what you think rule sub part 3-A means that a defense attorney in this case could say that you feel since they've held you out as an expert in this area apparently or at least knowledgeable what you believe the defense attorney can say?

[50] A. On 3-A?

Q. Yes.

A. The general nature of the claim or defense. That is what you're saying.

Q. Correct.

A. My guy wasn't there. He had an alibi. He was in Saskatchewan.

Q. So he can set forth in your opinion defenses?

A. It would appear the general nature of them.

Q. Assuming that a polygraph was admissible can he say that "My client passed a polygraph"?

A. I don't know because whatever you say you may wind up here. I think that's the whole issue. You don't know what you can say so rather than say anything, you say nothing and that hurts your client.

MR. URGAS: I have nothing further.

THE CHAIRPERSON: If counsel have no further questions, the witness can be excused.

THE WITNESS: Thank you.

MR. GALATZ: Thank you very much.

(Whereupon Brian Lee [51] Greenspun was excused.)

MR. GALATZ: Dominic, do you want to swing over there where you can be seen.

THE CHAIRPERSON: Before we continue, Mr. Galatz, is there a complete transcript of the tape Exhibit 4 in evidence?

MR. GALATZ: No.

THE CHAIRPERSON: Is that a part of your package?

MR. GALATZ: No.

THE CHAIRPERSON: I thought that it was. It's been called to my attention that the court reporter did not transcribe the tape as it was being played.

MR. GALATZ: I have a transcript that I can make available to you a copy. [sic]

THE CHAIRPERSON: Okay.

MR. GALATZ: There are a few words in the beginning it missed. The transcript—

MS. HANSEN: Is it by a court reporter?

THE RESPONDENT: Lisa Brenski.

THE CHAIRPERSON: We'd like to get a copy of that—

MR. URGAS: Isn't that part of what C is?

MR. GALATZ: That's the voir dire [52] examination, opening statement, final argument. The press conference I have a copy. I've got markings on mine. Do you have a clean copy?

THE RESPONDENT: Of what?

MR. GALATZ: Of the transcript of the—

THE RESPONDENT: I don't have one with me but I know I must have one. I mean I have a complete copy of everything.

MR. GALATZ: I have notes on it so I obviously have have some reason—

THE CHAIRPERSON: We have to have that as part of the record. I thought like Bill did it was a part of exhibits.

MR. GALATZ: I misled you then. That was not part of it.

DIRECT EXAMINATION

BY MR. GALATZ:

Q. Would you state your full name again for the record.

A. My name is Dominic Pasquale Gentile.

Q. Mr. Gentile, could you tell the panel, please, where you went to undergraduate school and law school?

[53] A. I did my undergraduate work and obtained my J.D. from DePaul University in Chicago.

Q. What bars are you admitted to practice before?

A. I am admitted in the State of Illinois, State of Nevada, the United States Courts of Appeals for the fifth, seventh and ninth circuits, the United States Supreme Court and a number of federal district courts I have appeared—I mean that's where I'm admitted. Okay. I've also appeared before many others.

Q. I'm sorry. Did you give us the circuits that you're admitted in?

A. Fifth, seventh and ninth.

Q. What about the U.S. Supreme Court?

A. Yes, U.S. Supreme Court.

Q. What part of your practice consists of criminal defense work?

A. I never did anything except criminal defense work. Okay. I do a little civil work now and then and I don't do it very well but I would say in the last 17 years, 90 percent of what I have done has been in the defense of [54] criminal cases. I've never prosecuted. I've never worked for a state agency.

Q. The criminal bar has certain associations that are devoted to that aspect of law; is that correct?

A. That's correct.

Q. Have you been active in any of those?

A. I've been a member of the National Association of Criminal Defense Lawyers I think since 1972 at the worse '73. I served six years on the board of directors of that organization. When I left Chicago in 1977 I left to become the associate dean at the National College for Criminal Defense. At that time I think it was called the National College for Criminal Defense Lawyers and Public Defenders. It was part of the University of Houston Bates College of Law and it was—it's still in existence. It's in Macon, Georgia, now but it's funded by at that time the

law enforcement assistance administration which is part of the federal government and also funded by the criminal justice council of the American Bar, the National Association of Criminal Defense Lawyers and the [55] National Legal Aid and Defenders Organization.

Q. How long did you serve as assistant dean?

A. Associate dean.

Q. Associate dean.

A. Two years.

Q. Was this a full time position?

A. Yes. 1977 and 1978 I lived in Houston, Texas, doing that.

Q. What were your duties, what was your job?

A. Putting together continuing legal education programs, writing books, writing materials for those programs, setting up seminars.

Q. Have you published any works in the criminal law field?

A. I've published a number of works in the criminal law field. The most recent one I oversaw a project for the—I was chairperson of the American Bar Association Criminal Justice section RICO committee and one of the projects that I started and we finally completed was we did a set of patterned jury instructions in RICO cases and it was published in the Volume I of the 1988 volume of the Brigham Young University Law [56] Review. That's probably the last thing that I did but that was like a year and a half ago.

I also have written a number of books. I wrote a book on the parent/child privilege which is a case that we were involved in here that actually made some law. That went through five printings over at the National College for Criminal Defense.

I did one many years ago on defending drug cases that went through a few printings too and I've written articles and stuff like that.

Q. Have you served on any of the Nevada State Bar committees?

A. When I first came to Nevada I served 1979 and 1980 if I recall—I was on the continuing legal education committee at that time and we did in fact set up a criminal law program that ran a couple of times.

Q. In Illinois were you active in the bar association?

A. The Illinois bar is set up with a house of delegates similar to the American Bar and I served one full two year term in the house of delegates back in I think '73-'74. That's a [57] long time ago. I don't really remember the years but I served two years elected to represent a district of the Illinois bar.

Q. With respect to Grady Sanders, when were you first retained by him to act as his attorney in the criminal charge?

A. Best of my memory I want to say November of '87. It was several months before the indictment was returned. It might have been December of '87.

Q. Prior to the time you were retained by him had you had any conversations with him with regard to the criminal charges?

A. Yes. Well—there were no criminal charges at the time but it looked as if they were inevitable. See, I knew Grady for a couple of years before representing him through mutual acquaintances and in fact when the story broke Grady was at the Alabama game. UNLV was playing Alabama and they were in Alabama or it might have been Auburn. I guess it might have been Auburn and I was called by Grady at home but I wasn't home so as a result instead of him getting in touch with me he got in touch with George Razabeck (phonetic) and George handled the [58] case from the day that the drugs were discovered missing all the way up until about the end of '87 when it became apparent that Grady was going to be indicted and then I got into the case.

Q. Prior to the time you were actually retained did you start following the press coverage part of which is reflected in Exhibit A?

A. Right from the beginning, from the very—I got to work Monday. I had a phone call that Grady had called me on Saturday. I think this was discovered on a Friday if I'm not mistaken but in any case right from the beginning before I even knew that Grady had called me I knew about this story.

I mean I just—yes. Once I learned that Grady was going to retain me if it became a problem, I started gathering materials on it, whatever was in the paper, whatever was on TV that came to my attention.

Q. To the best of your knowledge does the schedule of Exhibit A reflect the newspaper and TV coverage that existed on the Grady Sanders matter?

A. If I had—to the best of my [59] knowledge it does. If I had to—

Q. Except for Channel 13.

A. If I had to venture a guess there is more. More existed than what you see here. See, during part of this period I was in trial in another case. In fact, it was the Blustein case. It was in front of Judge Foley at the time when all of this happened and my memory is that there was probably stuff that got by me because I was involved in the other matter.

Q. When you were retained what was the stage of the proceedings at the time you were formally retained by Mr. Sanders?

A. Somehow it came to Grady's attention, and I think it was probably through Mahlon Brown or maybe George Razabeck that the indictment was imminent. It was going to be forthcoming rather quickly. Mahlon and George were both percipient witnesses so neither of them could really represent this man and in fact they both testified at the trial.

When it became apparent that an indictment was forthcoming and that it was going to be a RICO prosecution, a state racketeering prosecution, that's when I became involved in it [60] and my first efforts on Grady's behalf was to try to avoid the indictment by discussing the

case with the Clark County District Attorney and his chief assistants that were involved in the investigation.

Q. Obviously you didn't succeed.

A. I didn't do a very good job.

Q. What occurred then with respect to the proceedings and publicity that was ongoing?

A. Well, before they—the indictment was returned—there was a unique case. I got an awful lot of advance information. With all due respect the District Attorney's office and the Police Department were so full of leaks it looked like a spaghetti strainer and they brought me, police officers primarily brought me plenty of information about their case well in advance of the indictment so we were able to determine early on what the charges were going to be, who the—who most of the alleged victims were and a lot of the facts that occurred that were investigated by the Police Department that they had turned up so what I tried to do was I tried to get before the grand jury whatever was beneficial to Grady's position in the case and in [61] fact an employee by the name of Harold Sullivan we searched for him for months and ultimately—

Q. Let me stop you because I don't think we're interested in the prosecution.

A. Well, the point is that I did have a lot of input into the case early on.

Q. Prior to the time you gave the press conference were you able to determine whether what had been said in the press was having any effect on Mr. Sanders and his family?

A. Well, I think there's two parts to the answer. From a legal standpoint it was my opinion that as soon as John Moran and Bob Teuton, because Teuton was there when it happened when he prosecuted the case, as soon as they announced publicly that the two police officers Schaub and Scholl had passed polygraph examinations and that as far as the Police Department was concerned that was enough to clear them so that they were no longer suspects in the case and that Grady—they

made the announcement that Grady Sanders did not take a polygraph and would not, at that point in time to the public as a whole I believe Grady was indicted and convicted.

That was over a year or close [62] to a year before the indictment was actually returned by the grand jury. Repeatedly from that point forward up until the indictment whenever the matter was discussed in the newspapers on that day Ned Day for example and Jeff Garman (phonetic) and other people that wrote about it they would always mention the fact that the two police were the first suspects but they had been cleared by polygraph.

I know that that polygraph examination was totally inadmissible and there was no way to get that before a jury. Naturally you would like to have literate jurors so I had to presume that they read the papers and watch television and I saw that as being a big hurdle that I'd have to get over.

Now, from a personal standpoint as to Grady personally Grady Sanders had had multiple open-heart surgeries prior to this even happening so he was not a man in good health and his health suffered from it as did his pocket because he was also the owner of a 99 year leasehold on the ground in Jersey that Donald Trump's casino sat on and he was being called in for a licensing inquiry by the New Jersey gaming [63] people as a result of involvement in this investigation before the indictment was returned.

He ultimately lost that ground lease before we went to trial. They refused to license him. After we went to trial and he was acquitted of course it was too late to do anything about that. He already had—so, yeah, there were problems. There were unique problems, unique to this case.

Q. What prompted you to call a press conference?

A. More than anything else my fear of the publicity that had cleared the two police officers. I was convinced, and I'll say it now, I'm still convinced that one of those

police officers, the man that I named on the tape, perpetrated the crime.

It is very rare for a criminal lawyer to have an innocent client. I know you hear a lot of shouting about my client, you know, didn't do it but in 19 years at that time, excuse me, 17, 18 I had been in and around criminal defense for 18 years at that time and I can't fill a hand with people that I've represented that were truly innocent. [64] Grady was one of them and I was concerned about how I was going to get over this hurdle as I perceived to be the tremendous imbalance that the only person who is I was convinced did it and the only person that I could lay it off on from the standpoint of the defense had been exonerated by the Police Department and the media. That's why I called the press conference.

Q. As a citizen did you feel any obligation to bring the policeman's conduct to the attention—

A. The answer is yes but I think that—I don't think I'm a stranger to anybody on this panel when it comes to doing civil rights work. I mean I think other people know that I do that and it is part of my upbringing. It goes back to when I was still in law school so yes, I felt an obligation to bring it to the attention of the public that a policeman may have committed a crime and that someone else was going to suffer for it.

Q. Have you ever given, held a press conference in any other case?

A. I cannot recall ever setting a [65] time and place and calling the media to that place at that time for purposes of giving a press conference. In fact, I mean there's no question I've talked to the media people a lot over the years but to hold the press conference I don't remember ever holding one. I think that's the reason that I did the work I did the night before.

I wasn't sure what I could say and not say at a press conference having never held one before, a formal press conference.

Q. What did you do the night before the press conference?

A. The night before this—again, let me put this in context. Okay? The indictment was returned and Grady and I went to Judge Leavitt's courtroom even though we weren't even supposed to be there. It's not on a calendar when an indictment is returned. The D.A. takes it from the grand jury, brings it to the chief judge and has a warrant issue. It's an ex parte proceeding.

We got advance notice of it so Grady and I were actually in court the day of the indictment. At that point in time the media did not know that it was out yet. There were no media [66] people in the courtroom and Judge Leavitt set a time for the arraignment and assigned the case to Judge White's courtroom.

I knew that once that became public knowledge that the media was going to be all over that courtroom because the next day after the indictment was returned it was all over the paper so the night before because I knew that the arrangement was going to take place the next day Gene Porter, Wenlee Jensen, Wenlee works for me, and myself—

Q. Gene Porter is also an attorney?

A. Gene Porter is an attorney. He has offices with me and has been working with me since 1981 I guess or '82. The three of us sat in the law library in my offices and went through the books and we researched this issue.

Now, I've collected materials on it in the past. We also did a West law search, by the way, on this issue because I knew that I was—I knew that there were rules that governed pretrial publicity. What I did not know is how those rules had been applied in the past in any given factual situation and I knew that I had to say something.

[67] Q. Before you go to that Exhibit D is that the, a copy, a Xerox copy of the materials you collected?

A. It is except there's one thing missing here. There's a book written by John Wesley Hall who is a lawyer from Arkansas that deals specifically with the ethics of

the criminal defense lawyer and I'm sure that I reviewed that book and I see that it's not in here.

Q. Other than that Exhibit D reflects the materials you put together the night before the press conference?

A. Yes.

Q. In viewing those materials with Wenlee and—I'm sorry. Who else?

A. Gene.

Q. Gene Porter. Gene Porter. What conclusions did you come to?

A. Well, the first thing that I came to conclude is there were—it was very important as to how long before the trial any kind of a statement is made. That's the reason that I did not make any statements before the arraignment. I needed to know when the case was going to be set for trial and Judge White on the [68] date of the arraignment which I believe was February 4th or 5th set the trial for August the 8th which gave us a full six months before trial.

There were cases that I had found in my research that held that two months and four months before trial were so far ahead of trial that there was a presumption that the statements, whatever they were, and they were far worse than what I said, whatever they were, they were not likely to taint the fairness of the proceedings so I thought first let's make sure that we've got plenty of time before the trial is scheduled because what I'm going to say I'm going to say today and I'm not going to talk again and that's the way we did it.

Secondly I went through the rule and frankly I must tell you I'm on the wrong side of this case but I still do not understand what I said on this tape that is being complained about. Okay? I must tell you that. I wanted to have a bill of particulars. I thought we were going to get one but I still don't know what I said that was wrong.

I know that there were certain things that obviously you could not do and the [69] tape, the videotape reflects what I thought you couldn't do. You cannot go count by

count and talk about the specific credibility of each individual witness. You can't talk about things that are not admissible in evidence which again was my whole reason for holding this press conference because something had been talked about a lot that was not going to come to the jury's attention.

By and large I came to conclude that what I said at this press conference the next day was proper and I still feel that way I must tell you in spite of the fact that I'm being looked into at this point in time. I don't think I did anything wrong.

Q. What do you think your obligation is to your client when he's been subjected to this kind of pretrial publicity, counsel?

A. I think that depends on what the client is and what the facts are quite frankly. There's no question that I owe to myself and to my feeling about myself I owe it to bring all the vigor that I can to defend anybody that I chose to defend. I'm in private practice. I'm not a [70] public defender.

I don't have to defend anybody. When I decide to defend somebody, I give it my all and I think I owe him that and if it means that a guy is wrongfully accused as Grady Sanders was, then I see it as my role to say so and if it means that improper methods are being used by the prosecution testimony, law enforcement testimony, the prosecutor and the police to poison a perspective juror venire then I have to fight back and they did that in this case.

Q. In addition to the prospective venire effects what role, if any, did the effects on your client's economic and social well being have to do with the press conference?

A. Candidly, Neil, in context it wasn't anywhere near as important. It is important and it is in my opinion a good enough reason to hold a press conference to say certain things. Okay? But in terms of this particular press conference what you see on that tape I cannot honestly—

I mean I had a lot of empathy for Grady and I have to say that I was very zealous in my approach at defending him and I [71] wanted to win for him because I thought he was innocent but it was because he was wrongfully accused more so than the impact it was making on his pocketbook and on his emotions although there was a very great impact and it did weigh somewhat in my decision.

Q. You mentioned an economic factor of the lease in New Jersey. What about socially, what effects did it have on him?

A. Well, I knew Grady Sanders socially. He wasn't a buddy of mine but I knew him socially and how do I put it? When someone is a professional criminal a criminal accusation really doesn't get in his way socially. They expect it. It comes with the territory.

Grady Sanders wasn't that and it effected him as much as it could effect any person who tries to live a legitimate business life the same way I think that it would effect anybody sitting in this room. He was demoralized and had a feeling of dismay and anybody who knew him supported him but many people took it as an opportunity to take a cheap shot at the guy.

Q. Did Grady respond adequately to these charges himself?

[72] A. How do you mean that?

Q. From—

A. You mean in the paper?

Q. Correct.

A. Through the media. No, I don't think so. I really don't think so.

Q. What limitations does an accused in a criminal case face when he tries to respond directly?

A. He will throw gas on a fire. He will make it—he will open up himself to making a public statement that later on he's going to have to swallow and besides that he's not as articulate. Nobody, no client that I have ever represented that I can think of would have been

able to articulately respond to the facts in the context of this particular case, the one that you have before you. I just don't think so.

Q. What happens if the accused such as Grady Sanders gives a statement in the press to his constitutional right against self-incrimination?

A. He waives it.

Q. Does that impose a realistic limitation on his ability to respond for himself?

[73] A. I would—as a lawyer I'd say yes.

Q. And as a lawyer what's your obligation in your opinion after research and viewing the coverage that had existed before you gave your press coverage to your client?

A. Is to tell him that I will be his mouth piece as bad as that term may be taken and swallowed. That is what I have to be in the context of a case like this. I must speak for him. I am his advocate. And he is not to say anything.

Q. The things that were stated by you in the press conference as viewed on the videotape here, was there anything you said in that conference that you did not say in that—in the trial of the Sanders case either an opening statement, closing argument?

A. Nothing, absolutely everything that is contained in that videotape came before the jury and was admitted into evidence one way or another at the trial of the case and I use that as my guideline in terms of what I could say and what I couldn't say at the press conference.

Q. So that everything that you said [74] was a matter that properly was allowed by the judge to go to the jury as a proper consideration?

A. Yes, and if I may take just a little bit of liberty, when the trial was over with and the man was acquitted the next week the foreman of the jury phoned me and said to me that if they would have had a verdict form before them with respect to the guilt of Steve Scholl

they would have found the man proven guilty beyond a reasonable doubt.

Q. The voir dire selection of the jury you obviously participated in that.

A. Yes.

Q. Was there a voir dire conducted with respect to the issue of pretrial publicity?

A. Yes.

Q. What was the nature of that voir dire, what was the result of it?

A. Well, the nature of the voir dire was pretty extensive. Both Judge White and the attorneys privately individually were permitted to question the veneering panel and the result was, if I may summarize it, the only thing that anybody remembered about the case that is the cops were the first suspects and that a polygraph [75] was passed which is exactly what I was afraid of.

Nobody remembered anything about me, never heard of me, didn't know anything about—you know, none of that. So apparently I wasn't very effective in my press conference anyhow.

Q. Was there any indication that an impartial jury couldn't be impaneled in Clark County for this trial?

A. On the day of the trial?

Q. Yes.

A. I was worried about it because with the way the voir dire was conducted when someone did speak up and talked about the police were the original suspects but they had been cleared, you know, it was in the presence of all the other prospective jurors so now if they didn't know about it to begin with, they knew about it now and we asked Judge White for individual voir dire and he refused it as most judges will do so I felt—even when we picked that jury I felt that we were going to have a hard time dealing with the pretrial publicity, yes.

Q. From the point of view of the prosecution that is?

[76] A. Yes.

Q. Is there any indication in your recollection of a problem from the point of view of the statements you made interfering with the trial?

A. Nobody ever heard of me or anything I ever said. No, there was no indication that somehow I prejudiced this jury.

MR. GALATZ: No further questions. Thank you.

THE CHAIRPERSON: Cross-examine, Mr. Howe.

CROSS EXAMINATION

BY MR. HOWE:

Q. Mr. Gentile, at the time that you held the press conference who were the expected prosecution witnesses to your mind at that time?

A. Well, I knew for sure they had to call Steve Scholl and Ed Schaub. I knew about seven out of the remaining—let's see now. There were two so-called victims that I did not know about at that time. I knew about the remainder. I don't—for me to tell you right [77] now, Mr. Howe, which ones I remembered—I mean which ones I knew about and which ones I didn't I can't remember but there were two that came as a surprise to me. Okay.

Q. This Steve Scholl and Ed Schaub were the police detectives?

A. Yes, sir.

Q. And you knew at that time or you expected, fully expected that they would be prosecution witnesses?

A. There was no way to prove the chain without those witnesses. They had to have those witnesses.

Q. And the so-called that you referred to them I believe as other victims were other people that supposedly had things taken from the storage facility?

A. That's correct.

Q. And there were a number of those who you likewise expected would be necessary witnesses for the prosecution?

A. If they were going to prove those counts.

Q. I believe you testified that your primary reason for calling the press [78] conference was your fear of the publicity that had cleared those two police officers, that being Steve Scholl and Ed Schaub; is that correct?

A. Uh-huh.

Q. So was the purpose of your news conference then to counter that?

A. Absolutely.

Q. To present the other side?

A. Absolutely. I felt it was fair rebuttal given what they had started.

Q. All right. Did—in your news conference do you think it's fair to characterize your references to particularly Steve Scholl who you mentioned by name a number of times as questioning his character credibility and reputation?

A. Now you're using three terms there.

Q. One at a time.

A. I don't think I said anything about his reputation.

Q. Okay.

A. Okay. I think I may have made—I think you can probably construe what I said as commenting on his character. Okay. [79] Because you certainly can infer that I suggested that he used drugs. Okay. I did more than that at the trial. He admitted he used drugs at the trial.

Q. And you questioned I think you—I think it's safe to say that he inferred that he had in fact stolen these drugs?

A. I didn't infer. I said it, didn't I?

Q. Which I believe would be considered to be questioning his character as well I would say.

A. Well, you know, you could say that.

MR. GALATZ: More theory of defense.

THE WITNESS: You could say that but, you know, that was the defense in the case and that's what subsection A talks about the way I read it.

MR. HOWE:

Q. All right. You referred in the videotape I believe to some audio and videotapes which were in your possession from the Vacarra case.

A. That's correct.

Q. Were those tapes admitted in the [80] trial?

A. And they were never showed to the media. They were ready to be admitted at the trial. Okay. If I needed them but once Steve Scholl admitted to his—he admitted to specific drug uses. Okay. Once he did that I didn't need to use them any more. I mean that would have been like beating a dead horse so I mean but they were there.

They certainly would have been admissible because they were Steve Scholl on the tapes. I chose deliberately not to introduce them because by that time I thought I had the case won.

Q. They were not admitted at the trial?

A. They were not even offered.

Q. All right. Was there evidence presented at the trial of the belief of the FBI as to the guilt or innocent of Detective Scholl or any other law enforcement officers?

A. There was an FBI agent called to give testimony at the trial. I don't know if you can—you'd have to read his testimony. I don't know if I can answer that. I don't know if I can answer that yes or no. All right? I know that I [81] didn't bring that up. I know that was a question put to me on the tape, not something that I volunteered.

When I say I didn't bring it up I mean I didn't bring it up at the press conference. If you'll recall from the tape the question is put to me I believe by George Knapp and I just sidestepped that question because of Ray Slaughter.

Q. I think you possibly indicated that you agreed with that opinion?

A. Yeah, okay, but I certainly didn't bring it up.

Q. Okay. Do you recall the references on the videotape from the press conference, the reference to the other, as you're referring to him, the other victims and the

statement that four were known drug dealers and convicted money launderers and convicted drug dealers. Is that an accurate statement of the comment you made?

A. That's an accurate statement.

Q. Do you think it would be safe to characterize that as a reference or a comment on the character, credibility or reputation of those [82] witnesses?

A. No, I don't, because I didn't name who they were. In fact it was precisely the reason that when the follow-up question came from Allen Clovin (phonetically) who was working for the R-J at that time I told him I could not go by it count by count and identify each and every one as an individual.

The way I read that rule you can speak in terms of part of your defense is that the witnesses do not have good character for truthfulness as long as you don't single out one at a time.

Q. And do you think that characterizing four witnesses out of six or seven and making specific references such as they're known drug dealers, convicted money launderers and drug dealers, do you think that's proper?

A. I do. You can bet that the prosecutor would have done it.

MR. HOWE: That's all the questions I have.

THE CHAIRPERSON: Redirect, Mr. Galatz?

MR. GALATZ: A few questions.

[83] REDIRECT EXAMINATION

BY MR. GALATZ:

Q. Did Sheriff Moran put before the press character evidence as to the good character of the detectives involved in this case?

A. He sure did.

Q. Did Sheriff Moran put before the press evidence of the Officer Scholl's passing a polygraph test?

A. Both of them, Scholl and Schaub he put that before the media and so did Lawrence Stevens who was their

immediate supervisor at the time and so did the—who was the other guy, the guy that just got in trouble with Judge Huffaker? I forget his name. I don't know. But you know who the guy is. The guy that had the Haupt murder case. What's his name?

Q. Okay.

A. Tom Dillard. So did Tom Dillard.

Q. There was a question about the FBI's view. Was the FBI's view of the proceedings made clear in the press coverage preceding your statements?

A. Definitely. In fact that's what [84] Ned Day was pounding away at. He was trying to—and as I recall so was Jeff Garman.

Q. What was the FBI view as expressed in the papers?

A. That they felt that the police were involved in the theft.

Q. And how did this relate to the Slaughter case?

A. Well, that depends on—you know, are you asking me what the media says about it? It's in there. Okay. For me to say to you how it related, it's somewhat convoluted. Okay? I mean there's no question that it was—they believe that Ray Slaughter passed both Scholl and Schaub on the polygraphs. Okay. And they wanted to find a way to make Slaughter admit that and they set this poor guy up by having him buy a gram of cocaine for some pretty woman and that's the bottom line to it all thinking that they could twist him.

I don't know if you understand what I mean by twist but it means that they could make him testify that Scholl and Schaub were in fact, you know, really didn't legitimately pass the polygraph. You got to remember that Slaughter [85] was also the guy that passed John Moran and Schaub and Scholl did not take a Metro polygraph. They took an outside polygraph so there's—never mind.

Q. The witnesses who were involved with laundering money, dealing with drugs, was this evidence adduced at

the trial and argued to the jury both in the opening and closing arguments?

A. Absolutely.

MR. GALATZ: I have no further questions

THE CHAIRPERSON: Any questions from any of the panel members?

MR. URGAL: I have a couple.

EXAMINATION

BY MR. URGAL:

Q. Mr. Gentile, what I'm concerned about is creation of a situation because you feel the police or somebody that's not an attorney says something that gives you a right to say something back. How do you in your opinion control the ability to have a free unobstructed trial if both sides are doing it regardless if the police or whoever is saying it's wrong that you have your [86] press conference, they call a press conference, you call a rebuttal press conference?

A. Mr. Urgal, I don't think I understand your question honestly.

Q. Well, I'm asking how do you weigh when you said you'd be able to counter the arguments that were coming out from the sheriff and the other people with the ability to have a free trial, a trial that's not prejudiced by this pretrial publicity?

A. Okay. I think there's two elements that are necessary for it to—for both to be able to happen and I think that's what this is really about.

It's not a question of a lawyer can't say. It's a question of he can't say it if it's going to prejudice something. I think that it has to be done far enough in advance of trial so that, so, in other words if it happened in the middle of the trial I think you've got a big problem on your hands. All right.

In case it comes to the attention of a juror, if a juror is it comes to his attention now all of a sudden you got

a mistrial on your hands so I think that the length [87] of time before the trial actually takes place is important.

Secondly, it depends on the content of what the law enforcement testimony says. Let me give you an example. It so happens that there was a—if I'm not mistaken—I'm almost sure that Bob Teuton who was the prosecutor in the case was in fact present when John Moran made this public statement that these two guys Scholl and Schaub passed the polygraph.

Well, now it's not just a policeman saying it. It's a policeman saying it with the District Attorney's office being there. Now, one of the canons, one of the rules of professional conduct says that you can't do through an investigator or what you can't do yourself. Okay? And that's what happened here. So if they started so to speak I'm not saying that I like to respond. I'm saying that I have to respond and if it comes close—if it comes close to being an ethical violation, then all I could tell you is that it's an ethical dilemma at the time and my allegiance is to my client.

Q. But from what I saw and so far have seen nobody has indicated that your press [88] conference or their press conference or anybody's press conference effected this trial whatsoever; is that correct?

A. I think if you read the voir dire—

Q. They have vague references. I looked at it.

A. Yeah, you know, but you got to sit through a voir dire.

Q. Oh, I understand. But what I'm saying there's been nothing to indicate that a juror said, "Yes. I remember this statement and I'm prejudiced," or, "No, I'm not prejudiced." Am I correct?

A. Yes.

Q. So what—

A. I think, you know what? I'm not sure if the general—you know the part of the voir dire that takes place before they actually seat people. I don't know if that was transcribed because a lot of people raised their

hands at that first go round that they had heard about the case. I think those were cut out.

Q. But the trial that you saw here you had a jury even though you had that problem [89] with Judge White you said en masse was a fair trial. I mean you had a good jury. Obviously you got a good verdict.

A. It worked. Thank God.

Q. What I'm getting it [sic] is what justifies you saying it's four months, six months before I can try my case with the press because the police are trying their case with the press?

A. I guess—

Q. And I think that's what you're saying.

A. I guess I'd have to lay that off to experience. You know, this isn't the first time I've been involved in a case where there's been a lot of bias in the media against my client but it is the first time I ever called a press conference to counter it. I mean this particular case was unique. I really felt that the whole county from which a venire he would be pulled at least as of February of 1988 had been poisoned. Okay? And all I was trying to do was even it out. I may have misperceived the whole situation. I'll admit that.

Q. Well, let me carry it one step further. You've got a reputation in town as a [90] good criminal defense attorney. What is to stop you the next time saying that, "I call these press conferences very rarely, but when I do my people are innocent." Now, what's to stop you that from [sic] the very next time saying that and maybe making a case even worse than whatever the police do?

A. I suppose only my own self-control and my own good faith.

Q. Do you believe that the State Bar has a right to regulate that type conduct?

A. Yeah, I sure do. I mean I'm not—I'm not saying you can yell fire in a crowded theater. I'm not saying that. I'm not trying to establish an immunity in general. Okay? But I think you have to take into consideration

what happened in the 12 months prior to my press conference.

If it wasn't for what happened in the 12 months prior to my press conference, I can assure you that my experience tells me that you don't make a case a public case to save a defendant. If it's not in the newspapers, you want it to stay out of the newspapers.

MR. URGAS: I have nothing further.

MR. MARTINEZ: I've got a question.

[91] EXAMINATION

BY MR. MARTINEZ:

Q. That was the actual press conference. What was the actual press release?

A. I didn't make one.

Q. Was there any of that tape disseminated to the public by Channel 8, 13 or 3 or any other?

A. Parts of it, parts of it. You know, little segments. That's the problem. That's why what you read in the newspaper was out of context. I'm really glad that we had the tape. At least from my point of view. I'd rather have the tape then [sic] not be able to prove what it was that I said and did.

I'm particularly glad we have it because it—I don't have to corroborate myself that I did the—that I looked into it the night before. I did it. All right. I'm—I'm glad we got the tape. I may get hung by it, you know, if you don't agree with me but at least it's what I said and not what someone else said I said.

MR. MARTINEZ: I have nothing further.

[92] THE CHAIRPERSON: Any other panel members have questions?

MR. GALATZ: I have a few questions.

REDIRECT EXAMINATION (continuing)

BY MR. GALATZ:

Q. Does it make any difference to your client whether the D.A. or the police make the statements that are improper or accusatory to the press?

A. No, it doesn't make any difference to my client and I can tell you that the entire body of civil rights law and constitutional law treats the two as one. There is actually a buzz word now in the criminal law that talks about the prosecution testimony. It was coined in the Vinciala Burneil (phonetic) case, the prosecution testimony. They're considered to be two sides of the same coin.

Q. The law indicates several other views on this subject. The Nevada rule is the ABA code and that's the most restrictive view; is that correct?

A. Yes.

[93] Q. There is another view which is the ABA standards of criminal justice fair trial and free press standards and these refer to the present danger, clear and present danger test, correct?

A. If I understood Rule 177 better—okay—I might not agree as to which is the more restrictive and which is the least restrictive I've got to tell you because having read 177 and tried to understand it and tried to apply it and having applied it in a way that I thought was legitimate it appears that at least some people think that I didn't. Okay. So I'm not sure. That would be the best answer I can give you.

Q. And then there's another test at least that is the clear and present danger in fairness to the trial?

A. Yes.

Q. And then there's another position which is phrased by a small national bar association American Trial Lawyers with some 40,000 odd members that says there should be no restriction on defense counsel's right to address the press; is that correct?

[94] A. Yes.

Q. There's a body of law that agrees that there should be no restriction at all on defense counsel that the right to free speech and press are totally open and the only restrictions would be on the government?

A. That's right, it is.

Q. You indicated confusion in applying Rule 177. Could you explain what you mean by the confusion. That's Exhibit E.

A. Well, I think it's self-evident that I'm here but I'll give you an example. How—3-A let's talk about that. The general nature of the claim or defense, what does that mean? How general or how specific can you get? The only thing that I could do to make that clear to me was to read some cases the night before and I thought I applied them and I was discrete.

There were things that I would not answer because I thought they were too particular. And this—there's another subsection. You know, how do you take 3-A and set it off against 2-A? Or how do you take 3-A and set it off against 2-D? How do you do that? I don't know, and I've been practicing criminal law [95] since 1972 as a licensed practitioner and a couple of years before that working with pro bono groups. I don't know. I have a feeling, however, that I've probably read more law on it than any other criminal practitioner did before he held a press conference.

Q. You mentioned the role of time. What was the significance of time in your opinion?

A. Supreme Court says that the United States Supreme Court and the Court of Appeals of New York—there were a couple of cases that were decided and they're in the material where the United States Supreme Court in one case held that a comment that about a confession that was ultimately inadmissible but the prosecutor made two months before trial that two months before trial was a long enough time before trial so that the prosecutor—so that it did not present a danger and the prosecutor

should not reasonably know that it might not present such a danger.

The New York Supreme Court case, and again it's in there, talked in terms of a defense lawyer making a statement four months before trial and they held that four months before [96] trial was so far ahead of trial that the lawyer did not violate any ethical ruling because it did not present a danger of actually tainting the jury.

The focus seems to be on the clear and present danger standard even though it may not be articulated in the rule itself. You know, I mean sometimes I guess you can get in trouble and I'm pretty clearly in trouble. Sometimes I think you can get in trouble by knowing too much about what the cases say because then you're suddenly relying upon something that somebody might say didn't count.

MR. GALATZ: No further questions.

THE CHAIRPERSON: Mr. Howe?

MR. HOWE: Nothing further.

THE CHAIRPERSON: Should we take a five minute break.

(Whereupon Dominic Gentile was excused.)

(Recess taken.)

THE CHAIRPERSON: Okay. We can go back on the record. During the break there was a discussion among myself and counsel and a proposal was offered which is likely to save some time [97] during the balance of the proceeding and I would appreciate it if counsel could make that proposal on the record so that the panel could consider it.

MR. GALATZ: We are trying to figure out a way to get three witnesses with different backgrounds before you in something under the hour and 15 minutes or so that it's taken thus far and what I suggested was that we briefly qualify each one so you can get something of their

diverse backgrounds without dragging qualifications out forever and then trying to ask a couple of summary type questions about their view of Rule 177 and the propriety of Dominic's conduct and basically the reasons for their views which might be the shorthand way of getting into the substance because their views, I can assure you, are much like you've already heard from different backgrounds and that was the suggestion of trying to find a way to get the material to you but in as quick and brief a form as possible.

THE CHAIRPERSON: Mr. Howe?

MR. HOWE: In the interest of saving time I'm willing to and based on the nature of the testimony that I expect to hear I'm willing to [98] waive the question and answer form, let the witnesses testify in narrative form. I have no problem with that.

I have stated to Mr. Galatz my feeling that I had an objection to the witnesses testifying in the form of an opinion as to whether or not the particular conduct of Mr. Gentile violates the rule because I think that's invading the province of the panel.

If the chairman will take that objection as a continuing objection and the panel will accept that testimony and let that with the panel's own determination as to what weight to give it as an opinion, then I'm willing to make it as a general objection, allow the witnesses to testify in this form.

MR. GALATZ: On the other side of that my understanding of our rules of evidence which apply to this is that an expert can give an opinion on the ultimate issues and it can properly give the opinion since they're all attorneys which would qualify them on this particular subject matter. The weight of any expert's opinion is always for the trier of fact to determine regardless of what.

THE CHAIRPERSON: Very well then. We will [99] permit the examination to go forward in the manner in which counsel has proposed without trying to

rule prospectively on any objections. The chair disagrees with Mr. Galatz's interpretation of the rules of evidence that being that a properly qualified expert can give an opinion as to ultimate facts.

I mean these witnesses are qualified and they will be able to express an opinion. The weight to be given to the opinion based upon their qualifications and the underlying factors would be for the panel.

MR. GALATZ: Again so you understand I am going to go through the qualifications in a short form because I'm trying to shorten this.

THE CHAIRPERSON: I understand that.

MR. GALATZ: Okay. Should I call one of them in? Let's.

THE CHAIRPERSON: Please do.

MR. GALATZ: Let's get the lady first so she can get out of here.

JANET ROGERS,

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, [100] was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GALATZ:

Q. Will you state your full name for the record, please?

A. Janet Frazer Rogers.

Q. Mrs. Rogers, will you tell the panel briefly what your training and experience has been as an attorney.

A. Well, I'm a graduate of the University of Tulsa Law School. I'm a member of the Oklahoma bar since 1974, the Nevada bar since 1978. I was with the I guess public defender's office, the Small Business Administration in Washington, D.C., and in, on January 1st of 1979 I went to work for Channel 3 as their general counsel.

I had a private practice as well until about 18 months

or two years ago when I decided that I really had to devote my full time and attention to the broadcasting business. We were expanding and so I terminated my private practice.

Q. In the area of your practice as [101] it relates to the television station, what exposure do you have to the problems of free press?

A. Well, I'm a member of the reporters committee on first amendment rights. I've been published in their magazine. I'm a member of Comic which is kind of a loose amalgamation. It's the Committee of Media In-house Counsel. There are 20 of us who meet once or twice a year. The next smallest company is the Milwaukee Journal so it's people like the general counsel news week [sic] and NBC and ABC.

And then on a day-to-day basis I deal with the news department. I clear and follow investigative journalism. I review ads. I watch out for defamation. I review stories on demands for retraction which we get once in a while. I do personnel matters, that sort of thing.

Q. You've reviewed the videotape of Dominic's press conference which is Exhibit 4. You've reviewed the press clippings and I think you've actually reviewed all of the TV 8 videotapes on the Sanders matter.

A. None of the 8. Part of the TV 3 [102] but not all.

Q. I'm sorry. I meant 3. I said 8 because it was first. 3. You've looked at the transcripts or the portions of transcripts Exhibit B on the voir dire, opening statement and final arguments of Dominic in the Sanders case; is that correct?

A. That's correct.

Q. Okay. Based upon all of those materials and your experience, training, do you have an opinion as to the propriety or impropriety of Dominic's conduct as reflected in Exhibit 4, the videotape press conference.

A. Well, I think my perspective is different. Although I'm a lawyer by training and been practicing for

15 years my perspective—yes, I do have an opinion on it. I assume you want me to state the opinion.

Q. Yes. We are trying to—

A. Okay. I think that if you construe the rules in any way that would find anything wrong with the statements that you are not only chilling free press. I think you're going further than that. I think you are encouraging slanted reporting. I think you are [103] encouraging prejudicial reporting. I think if you take a very strict construction of that, those examples set out in Section 2 I think have occasion [sic] or ordinarily this and this and this are forbidden, if you—right.

Q. That's Exhibit E is the rule.

A. Okay. Part 2 of the rule where ordinarily the statements, these statements are likely to have the effect. Okay. And then it goes A through F. If you construe that very strictly and very broadly and then paragraph 3 which says regardless of what we said in paragraph 2 you can still discuss the general nature of the claim or defense and the information contained in a public record, if you construe that very narrowly while you're construing the first one very broadly you create a situation where the press can't do anything. I mean chill, maybe frozen and I think prejudicial. I think that is—well, prejudicial and as I say I speak from a different background.

Q. Talk to the panel.

A. The First Amendment and the Sixth Amendment and all that is in my view more applicable when you're talking about what [104] Mr. Gentile may have a right to say or what Mr. Sanders may have a right to expect in terms of the Sixth Amendment but from my perspective I'm more interested in what the public has a right to know.

It's a common law right. It pre-dates the Constitution. It stems from the same basic considerations as the First Amendment but the recipient of the common law right to know is the public as a whole and the press

specifically is charged with informing the public [sic] the things that they have a right to know.

The Supreme Court has said that the reason—the reason for the common law right beyond the Constitution is specifically because the public needs to watch government officials. They need to watch the activities of institutions. They need to watch facets that control their life that they may not have access to if the media doesn't exercise the public's right to know.

In fact it may be near and dear to me because I argued in one a case of first impression and in the Ninth Circuit in '86 and it was exactly on that common law right to know. And [105] in this case I think the, that the public had a right to know if the police were involved in it what the allegations had been.

I think that the way that news gathering happens [sic] that if you don't allow a lawyer to say the really rather circumspect things that were said here was not I don't find it to be arguing of a case or making, you know, or overstating the evidence which never really, you know, turned out to be but a general—I think it's a general nature of the defense which I think is what it was.

Then what you have is a bunch of reporters who are basically kids who you have out on the street who are definitely not lawyers who go out and try to find out what to report, how to fulfill the public's right to know. What do we tell the public about what's happening, [sic] and they go to the sources that they know of to go to and they go to the indictment because they can get that and then they go to the police because they have contacts there.

You know, we do things with the nasty boys every day. We do things about the prostitution and the drugs on the street. So Dan [106] Burns knows policemen and if Dan Burns has a question about a case, he's going to call some of the policemen who are his friends and they're going to tell him that side of the story and they do tell him that side of the story and we're going to put it on because there is a right to know and the public has a

need to know and I find it actually kind of morbid and I have personally argued with my news director to try to cut down on some of the crime coverage and, you know, we have crime watch or whatever and we have all—and I get really sick of having the first four stories every single night be somebody getting stabbed or a 7-Eleven getting robbed but that is what our research shows people want to see and if that's what they want to see, that's what we're going to put on and it's more so by the way when it's not some, you know, known drug dealer but it's somebody who is a respectable person.

It's like the clay feet syndrome. You know, people eat that up. They love it. It's there but for the grace of God go I and hearing that some scum bag got picked up is not real interesting. Hearing that some guy in a suit got picked up now that's juicy stuff.

[107] So what are we going to do? Not cover it. All we can do is read the indictment, read the Information, talk to the police people, policemen, that's all you're going to hear. So I think that it doesn't only chill it. I think it produces prejudicial and slanted news coverage. I think as to the specific effects of in this case the two statements made that seem most controversial to me or seem to me in reading through the stuff that it was focusing on I think that the effect is numb.

Our research shows us that the average viewer has to hear an ad three times a week to remember it. Certainly one comment, you know, is not going to do it even if the viewer happened to hear it so I think that that is probably the answer as to when he is.

He said something to the effect of "I think my client is innocent" or "The evidence will prove my client is innocent" or whatever, I don't think on voir dire these people remembered hearing it. I also don't think that it would prejudicially impact at all.

I think there was no probability, much less a substantial probability [108] of prejudicial influence because I think people think that if you didn't believe in your client or if you weren't at least going to say you believed

in your client I don't think they'd think you'd be up there so I don't think any of them thought two hoots about that.

As to the and [sic] the police are, you know, suspects in the case or I don't know the verbatim quote out of the videotape but I think there again it had no effect, not a substantial effect. I think it had no effect. In the first place it wasn't the first time that this had ever been, the idea had come up.

My recollection was that it was an R-J story a year before this that the police are [sic] suspects already. Now, this is hot news. This is something people might remember and this is repeated by more sources than just Mr. Gentile. This is not something new when a year after the R-J story he mentions it again and he mentions it as being part of his defense, his general plan of defense. And also by the way part of the ongoing investigation that was the other side. Okay.

I think then in voir dire that [109] the jurors said no, that that would not have any impact on them and I think you have to—I think that the whole system of being judged by your peers goes down the drain if you don't at least go in with the idea that the jury's going to be honest and then I think that throughout the course of the trial the opening statement—I did not read the trial transcript but I read the opening statement.

I read the closing statement and I mean that is what the defense kept pounding and pounding and pounding in to the jurors is Mr. Sanders did not do this. It was the police who did this. So I don't know how a remark made prior to a trial would have any prejudicial impact on a trial where the whole thrust of the defense is that it was police who did it.

I guess I've gone on too long. I don't—

MR. GALATZ: We're trying to get a narrative so we can open you up for questions and why don't you stop there and if there's cross-examination questions.

THE CHAIRPERSON: I take it then Mr. Galatz is through with his questioning. [110] Mr. Howe, anything?

MR. HOWE: I have no questions.

THE CHAIRPERSON: Any questions from the panel members?

THE WITNESS: I will just ask you to seriously consider the kind of predicament you're leaving us in if you forbid the defense from talking. If you so broadly construe paragraph 2 and so narrowly construe the exception about the general defense because I do—we have a problem when you have a reporter who only gets one side of the story because we don't allow our reporters obviously to make up what the defense will be and we won't let them speculate.

So what are they going to do? It would chill speech if it were something that you could just say this is not of interest to the community so since we can't get both sides we're not covering any side but the real world doesn't work that way because Channel 3 is not going to say that when Channel 8 does it as the lead story.

THE CHAIRPERSON: Okay. Thanks very much.

THE WITNESS: Thank you.

[111] THE CHAIRPERSON: The witness may be excused.

(Whereupon Janet Rogers was excused from the room.)

EDWARD KANE,

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GALATZ:

Q. Will you state your full name for the record, please?

A. Edward Kane, K-A-N-E.

Q. Mr. Kane, will you tell the panel, please, your educational background and your experience as an attorney.

A. Yeah. I'm an attorney. I graduated from St. John's Law School in New York in 1972. I came here to Las Vegas in 1973 with the United States Air Force. I served four years with the Judge Advocate negligence office at Nellis until '77. Thereafter I served three years [112] at the Clark County District Attorney's office, moved to Reno in 1980 to take a post as assistant United States Attorney in the Reno office of the United States attorney. I stayed there about 15 months.

At the end of 1981 returned here to Las Vegas to take the job of Chief Assistant United States Attorney in the United States Attorney's office here in Las Vegas where I remained until July of 1986 at which time I entered private practice. I'm in private practice now and partnership with B. Mahlon Brown who is a former United States Attorney here in Las Vegas in the firm name is Brown & Kane.

Q. You've reviewed the videotape of Dominic's press conference Exhibit 4. You've reviewed the voir dire, the opening, final arguments and the press clippings and coverage of Exhibit A and other items that are referred to were Exhibit B I believe?

A. Yes, I've reviewed all those materials.

Q. Over the years you've had a little experience I would imagine with press and TV coverage in criminal matters.

[113] A. Quite a bit.

Q. Can you tell the panel, please, what your views are on the effects of Rule 177, the meaning of Rule 177 as it relates to criminal cases and the propriety or impropriety of Dominic's conduct. And we are asking for a narrative, yes.

A. Okay. First of all as a prosecutor I have witnessed first hand and I have participated in the kind of damage that the publicity surrounding an indictment can do to someone who is accused of a crime. We lawyers are used

to legal instructions where juries are informed that an indictment is only an accusation.

It is no evidence of wrongdoing on anyone's part. That is technically true in a court of law. It is nonsense to tell public at large. The public at large views an indictment as far more than simply an accusation. Even a person who is eventually vindicated following a trial will always suffer with the stigma of indictment.

As a government attorney I understood that. As a government attorney I didn't have any problem with that because the [114] people that I was prosecuting I felt were bad people and if their reputations were damaged because they were indicted, so be it. I didn't feel that it was anything more or less than what they deserved.

I also learned as a government attorney that there were and are many other ways to get damaging information about a defendant before the public eye without violating any rules or anything else and to do damage to that defendant and again I saw nothing wrong with that and I did it as a government attorney.

Probably the most common way that any prosecuting attorney will tell you is a bail hearing. At a bail hearing if you have any damaging information about a defendant that you want to get before the public but it would be improper for you to call a press conference and comment on. You can certainly raise those items in good faith as long as you believe them to be true as arguments at a bail hearing and again as a prosecutor I saw nothing wrong with that. I was doing bad things to bad people and they were the things that they deserved to have happen to them.

The point of all this [115] background is that our system is set up in such a way that to say that no damage is done to a person who is indicted because an indictment is only an accusation is nonsense. The return of an indictment and the publicity surrounding that indictment does a great deal of damage to an individual and if this rule is being interpreted by this body or by anyone else

as saying that a defense lawyer can't attempt to repair any of that damage, that a defense lawyer has to confine his efforts simply to arguing a trial and securing an acquittal for his client if he can is to miss the whole point.

A lawyer owes a duty to his client. His duty is to protect his client as well as he can within the bounds of the law and a person who is indicted, using the Sanders case as an example, his reputation is damaged. He is undergoing a great deal of damage and hurt far prior to a trial and an attorney I do not believe acts improperly when he attempts to repair that damage.

I have reviewed the statements that were made by Mr. Gentile in the press conference and I've reviewed the rule. I've come [116] to two conclusions. I think a strong argument can be made that those statements do not violate the rule because the rule in my mind was intended to prevent certain types of statements, statements where a defense attorney might express a personal belief in his client's innocence and might hint that there's evidence that will never come out and thereby try to poison the well of public opinion and secure for his client an acquittal that he's not entitled to.

That to me is a whole different type statement than statements that were made at this press conference which were "My client is innocent and we will produce the evidence that will show you that. We think that the police officers are good suspects and in court we will produce the evidence that shows you that there is more reason to believe that they committed these crimes than that my client committed these crimes." I view those as statements that are not in violation of the rule.

The second conclusion that I've come to is if you think those statements are in violation of the rule and if you're right, then [117] the rule is absolutely unconstitutional. The rule impedes both an attorney's right to freedom of speech and expression and a defendant's right to effective assistance of counsel because again if an attorney is to

do an effective job defending his client and defending him again means more than just defending him in court. It means defending him against the damage that he incurs outside of court.

If a lawyer is going to be able to do that, that lawyer has to be free to speak and if a defendant is going to receive what the law says he is entitled to which is an adequate defense, then the lawyer can't be hamstrung so on both of those grounds on the defendant's constitutional right to effective assistance of counsel and on a lawyer slash citizen's right to freedom of speech if what this rule says is that a lawyer cannot say my client is innocent and we will prove it, then this rule is facially and blatantly unconstitutional.

MR. HOWE: No further questions.

THE CHAIRPERSON: Mr. Howe?

MR. HOWE: I have no questions.

THE CHAIRPERSON: Questions by any of the [118] panel members? Okay.

THE WITNESS: May I impose on the panel for just one minute and I know it's late and I know you've been here a long time and I know nobody asked me a question but there is one thing that I would like to say.

THE CHAIRPERSON: Sure.

THE WITNESS: I spent, as I've detailed for you, the first 13 years or so of my career as a prosecutor. I like to think that during that period of time I was a dedicated public servant. I still am a dedicated attorney and am dedicated to what I believe to be the ideals of our profession.

I think that compared to Dominic Gentile I hardly stop to think about what it means to be a lawyer and what I mean by that is I know a lot of attorneys and I know attorneys who go from day to day from week to week and from year to year and they never stop to think about what they're doing. They never stop to think about their ethical responsibilities. They never stop to think about

their conduct and how their conduct fits within the ethical guidelines that they have to observe.

[119] I know a lot of attorneys that never occurs to. I've worked cases against Mr. Gentile. I've worked cases with him. I shared office space with him for a short period of time when I first went out into private practice and I can tell you that I have never met an attorney who takes his ethical responsibilities more seriously.

I have never met an attorney who I less expected to see as a respondent in a hearing like this and I don't think I've ever met an attorney who deserves more to be vindicated at the end of this hearing than Mr. Gentile does. He is an honest and ethical attorney who abides by the rules and he did so in this matter.

THE CHAIRPERSON: Thank you, Mr. Kane.

EXAMINATION

BY MR. URGAS:

Q. Let me ask a question. Nothing to do with that last speech. But looking at 2-A. Do you have Exhibit E in front of you? I take it, Mr. Kane, you would admit that the state or the public is entitled to a trial that's fair to the public's side, the prosecution's side, both sides? [120] A. I do.

Q. Now, let's take the example where you know it's truthful that the witness or the person who is going to be called as a witness, the key witness, has got a criminal background or has got some other character problem or reputation problem. Do you believe it's proper for a defense attorney to bring that forward at a press conference even though he may be able to bring it forward and prove it at a time of trial, in other words try his case ahead of time?

A. I don't think it's proper for him to try his case ahead of time in the sense of detailing each and every item of evidence he's going to present to the trial. To say something like the government's witnesses are not credible and we will show that based upon their past

records or based upon their bias, I don't think is improper at all and in this particular case I can specifically recall Mr. Gentile towards the conclusion of the press conference being asked by the reporters for exactly those kind of details and refusing to give them.

Q. So do you draw the distinction between 2-A and 23-A [sic] meaning that you can talk in [121] general terms as you've described but you can't say that this witness was convicted of armed robbery ten years ago or was convicted of fraudulent conduct of some sort and naming a crime?

A. I think that if you get into those kind of details you would be running a risk of violating the rule and what I mean by that that if your comments later turned out to be based on admissible evidence I don't think that you would have done anything improper but when you start talking in detail about impeachment evidence that will be offered at trial, it may be that the judge won't let you offer some of that specific impeachment evidence and now you have made a public statement that has been disseminated to the public and of which they have knowledge concerning matters that may not come into evidence at trial and so I think if you get that specific, you run the risk of violating the rule.

Q. All right. So your basis for the violation of the rule is whether it's admissible or not.

A. I think that if you refer to evidence that was not admissible or which you know [122] did not exist you would be violating the rule.

MR. URGAS: I have nothing further.

THE CHAIRPERSON: Any questions by any other panel members? Mr. Galatz, any questions?

MR. GALATZ: No.

THE CHAIRPERSON: Mr. Howe?

MR. HOWE: No.

THE CHAIRPERSON: Okay. Thank you, Mr. Kane.

(Whereupon Edward Kane was excused from the room.)

MICHAEL DANIEL MARKOFF,

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GALATZ:

Q. Will you state your full name for the record, please.

A. Michael Daniel Markoff.

Q. Will you tell the panel, please, what your educational background has been and what your experience has been as an attorney?

[123] A. As far as my higher education is concerned I attended the University of Nevada Las Vegas, have a Bachelor's of Art. That's in history, American history. Attended the University of San Diego School of Law. I have a Juris Doctorate. I graduated in 1973. I was in private practice for approximately two years, accepted a position in 1975 as an assistant federal public defender and since 1980 I have been federal public defender for the District of Nevada.

Q. You have reviewed the videotape Exhibit 4, the press conference of Dominic, the voir dire excerpts, the opening statement, the final argument and the Exhibit A, the press coverage of the Sanders case; is that correct?

A. Yes, I have.

Q. Based upon the materials you've reviewed and your experience in the practice of criminal law do you have an opinion as to the propriety or impropriety of Dominic's press conference and the interpretation, application of Rule 177?

A. Yes, I do.

Q. Tell the panel, please. We're [124] asking for a narrative, yes.

A. Okay. Having looked at the videotape, the clippings, read the comments in the transcripts and things

of that nature, and also being a practitioner of the law for some 15 years I guess now, 16, whatever it's been, I think that the comments that Mr. Gentile made are completely justified. There is absolutely nothing wrong with what he said and he had every right in the world to say it under the law and under the Constitution of the United States.

Q. Tell the panel why you feel this way.

A. First of all, just reading the Constitution itself and the First Amendment guaranteeing the right to free speech and the Fourteenth Amendment which incorporates the entire Bill of Rights of which the First Amendment is one of them making it applicable to the states he has a constitutional right both as an individual and as an attorney speaking on behalf of his client to state his position and make that known to the public.

I have looked at the rule and it is my opinion that the rule is nothing more [125] than a prior restraint upon the exercise of the perhaps the most fundamental freedom that we have in this country. That's as plain and simple as that. The rule itself is fashioned perhaps with good intentions and nobody can fault those but there are far greater and more important things in this world and that is our right to free speech.

A client, a defendant, if you will, has rights beyond that of just free speech. One of those is to be effectively represented by counsel and that is guaranteed by the Sixth Amendment of the Constitution. Effective representation does not mean just getting up in a courtroom and saying what your claim or defense is. It goes beyond that because whenever a charge is brought against an individual, whenever be that individual guilty or be he innocent at the time that charge is made that man's life for all practical purposes is done. It's condemned. It's been held up to public ridicule by the legal process.

Now, a person has the right especially where the attorney has reviewed the facts and is cognizant of what's

going on to start presenting a defendant's version of what happened [126] because publicly that defendant has been condemned and part of effective representation, the effective assistance of counsel is that the Constitution guarantees and enshrines in the Bill of Rights is the ability of an attorney to get up there exercising another right, the First Amendment freedoms, and start speaking on behalf of his client and what I've seen in the words that were used in this particular instance is nothing more really than what the evidence is expected to show and what it did show and bore out what was said in the final analysis.

If there ever comes a time when the prior restraints of free speech are put upon an attorney and the ability to go out and effectively and zealously represent somebody not only in the courtroom but in front of the public as well then frankly those rights don't mean a damn thing and that's all there is to that.

MR. GALATZ: I have no further questions.

THE CHAIRPERSON: Mr. Howe?

MR. HOWE: I don't have any questions.

THE CHAIRPERSON: Questions by any members of the panel? Okay. Mr. Markoff, thank you very much. [127] THE CHAIRPERSON: Any further witnesses, Mr. Galatz?

MR. GALATZ: There was one other witness, George Knapp from TV 8, a newscaster, but unfortunately with the continued dates he's unavailable tonight and I don't want to drag this hearing through another night so we will somewhat reluctantly I guess waive calling him and submit it.

THE CHAIRPERSON: Okay. So you're resting. Mr. Howe, any rebuttal witnesses?

MR. HOWE: No.

THE CHAIRPERSON: Then I guess we're prepared to entertain closing arguments if you have some you'd

like to make, although I think it's fair to say that the panel members understand pretty well what the issues are.

MR. GALATZ: I certainly think so and I mean, again, it's up to Mr. Howe. I would be willing to submit it. You've got the materials.

MR. HOWE: There are a couple of comments I'll make. I won't make an elaborate closing argument and I won't go into detail on the statements from the conference. Those are before the panel but there are a couple of issues that I [128] think I should just briefly address as to state the position so the panel knows the position that the State Bar takes with regard to those.

No. 1, I think the argument has been presented that there is a need for defense comments to counter statements made by the press, to the press by the sheriff and other police officers. I don't believe that that justifies comments by an attorney. There is case law to the effect that it does not. There is case law to the effect that an attorney is an officer of the court and is held to a higher standard and that the rule applies and that is not one of the exceptions to the rule the fact that some police officer may have made a statement and now the, and that that opens the door, if you will, for an attorney to make statements that would otherwise be improper.

There has been a great deal of discussion about whether or not there was actual prejudice to a fair trial in this particular case and I don't believe that that is a legitimate issue. An attorney has either violated this rule or not violated this rule at the time he makes his statement.

The rule prohibits a statement [129] that is reasonably—excuse me—rather than paraphrase it. That a reasonable person would expect to be disseminated by means of public communication if he knows or reasonably should know that it would have a substantial likelihood of materially prejudicing and adjudicating process.

He either has to—he makes a statement and he's either committed a violation of the rule or he hasn't. We can't

wait around until the trial happens and then find out whether or not the action that he took back then violates the rule because we're now going to wait and see what the prejudice is.

The rule is clear that a volition [sic] either occurs or doesn't occur at the time the statement's made and the fact that there was or was not actual prejudice at the trial may help us in deciding whether or not that statement was or was not a violation but the volition [sic] occurred there at the time he made the statement and he is not either expunged or incriminated by what happens some time later.

The constitutionality of this rule I believe is beyond the purview of this [130] panel. Certainly it's legitimate for the respondent to raise that issue here and preserve it if it is appropriate for him to appeal to a higher court so that he has it preserved for appeal. This panel must take the rule given to it by the Nevada Supreme Court and apply that rule and only the Nevada Supreme Court or a higher court can decide that the rule is unconstitutional and throw it out.

Certainly we've heard a lot of arguments which could reasonably be interpreted to say that this is a bad rule. That doesn't change the fact that this is the rule and unless and until this rule is overturned or abolished the attorneys licensed in this state and practicing in this state are bound to abide by it.

The final matter that I think it is appropriate that I address is the issue as to appropriate discipline should this panel find that there's been a violation. I think there is ample evidence before this panel as to Mr. Gentile's reputation and ability as an attorney although I believe that he has committed serious violations of this rule and this is—

MR. GALATZ: Excuse me, counsel. I [131] object. You have just violated the rules yourself.

MR. HOWE: I certainly haven't violated 177 because I'm not making an extrajudicial statement.

MR. GALATZ: You just stated your personal beliefs, counsel. I'm not picking on you, John, what I'm pointing out to you is it's real easy to slip.

MR. HOWE: It shows that there's been a violation and that it is a serious one. I do not believe that there is any basis upon which there should be any recommendation by the bar or by this panel for a suspension or a more serious recommendation.

I believe that the rule—it is essential that this rule be enforced and that the attorneys of this state be placed on notice that it will be enforced and what type conduct will be considered to be a violation of it. With that in mind I think that should the panel find that there's been a violation of the rule that the appropriate discipline to be imposed would be a public reprimand.

MR. GALATZ: Very, very, very briefly I [132] would remind you that Rule 105 E requires that the findings of the panel have to be supported by clear and convincing evidence. And there is in my view of the evidence no clear and convincing evidence that there was a violation of the rule to start with. The rule is certainly vague and unclear and conflicting enough that each and every statement and the opinions of several very competent attorneys who have testified fall within the proper purview of the statements permitted under the rule.

The briefs address at great length the constitutional issues and I don't think that this panel or any panel that's enforced with the obligation of doing justice has to sit back and say that we will enforce something that we think is then unconstitutional and that you have a perfect right to conclude that the rule is improper and throw it out and certainly the view that's being offered is absolutely a prior restraint to view.

We judge it by the time the statement is made performed without effect on the jury when we see that the uncontradicted evidence is that there was no effect on the jury in this [133] instance. If you're taking it back in time then you are absolutely into a prior restraint and

if you're into a prior restraint under all of the tests of constitutionality, the public's right to know, the right to free speech and the attorney's obligation to defend a client in the real world which includes a little bit more than the courtroom would all absolutely make this rule unconstitutional.

I'm not going to belabor you. You've listened to I think some very outstanding attorneys from very diverse backgrounds and I won't take any credit on the brief our office submitted but I think that the amicus brief is done and that under any view there is no violation. There's certainly no violation that's been proved by clear and convincing evidence and that you're dealing with a rule that is unconstitutional certainly as it's intended to be applied here and I suspect it is under any circumstance. Thank you.

THE CHAIRPERSON: Anything further, Mr. Howe?

MR. HOWE: Nothing further.

MR. URGAL: Can we get that transcript?

[134] MR. GALATZ: Let me look and see if I can find it. Let me show it to you, John.

MR. URGAL: It would be useful in deliberations.

(Discussion off the record.)

MR. HOWE: It's apparently done by a court reporter. I assume that it's complete and I don't have any objection.

MS. HANSEN: Can we just get a stipulation that that will be the transcript that's admitted into evidence.

MR. GALATZ: So stipulated, but I want my copy back.

MR. HOWE: We can make a copy right now.

MR. GALATZ: Okay. Fine.

MS. HANSEN: That's the way to do it.

THE CHAIRPERSON: So, John, do we have a stipulation on the record between you and Mr. Galatz that this is exhibit next in order which will be F shall be treated by us as the true and accurate complete transcript?

MR. HOWE: So stipulated.
MR. GALATZ: So stipulated.

(Remarks off the record.)

(Whereupon, Respondent's Exhibit F [135] was marked for identification by the court reporter.)

(Whereupon the proceedings concluded at 10:06 P.M.)

[Reporter's Certificate Omitted in Printing]

SUPREME COURT OF NEVADA
CLIFF YOUNG, JUSTICE
Capitol Complex
Carson City, Nevada 89710

[SEAL]

March 8, 1988

Ann Bersi, Ph.D.
Executive Director
State Bar of Nevada
295 Holcomb Avenue
Reno, Nevada 89502

Dear Ann:

Enclosed are two articles which appeared in the Las Vegas papers on February 6, wherein apparently Dominic Gentile held a news conference after indictment of one of his clients, stating he is innocent of all charges.

I would appreciate it if you would refer this to bar counsel for a determination whether there was a violation of our Rules of Professional Conduct.

I would appreciate being advised whether any action is being taken with respect to this occurrence.

Sincerely,

/s/ Cliff Young
CLIFF YOUNG

CCY:jit
Enclosures

[Attachments reprinted at J.A. 100-103 and 127-129.]

Las Vegas Review-Journal
February 2, 1987, p. 1A

BURGLARY OF POLICE VAULT PROBED

By Alan Tobin
Review-Journal

Sheriff John Moran said today Metropolitan Police have 15 possible suspects in the theft of an undisclosed quantity of cocaine and \$300,000 in blank travelers checks from a secret police safety deposit box.

The items were discovered missing Saturday from the safety deposit box at Western Vault Corp., 2929 S. Maryland Parkway. The department's intelligence bureau used the box to secure travelers checks and narcotics used for undercover investigations.

At a news conference this morning, Moran said there were no signs of forced entry into the box. Access could only be gained if two undercover officers were present along with an employee of the vault company, police said.

Possible suspects include police and employees of Western Vault Corp. The serial numbers of the blank American Express Travelers checks have been entered into national and international law enforcement computer systems, Moran said. He said none of the checks have been cashed as far as authorities know.

"We have developed 15 suspects that we are going to have to eliminate by the process of the investigation itself," Moran said.

The sheriff also said reports that the intelligence bureau's undercover apartment was burglarized in connection with the theft were erroneous.

"No undercover location utilized by this department has been compromised in any manner other than the

safety deposit box at the vault corporation," Moran said. "Further, reports of jewelry and cash being taken are erroneous. None of these items were kept in the vault."

The investigation into the theft is being conducted jointly by the department's detective bureau and the criminal intelligence section under the direction of Cmdr. Jerry Cunningham. It is not known how long the investigation will take.

"Metro is a victim in this particular case," Moran said. "And being a victim it will be handled like any other criminal investigation. I have complete faith and trust in the investigators and I'm certain they will leave no stone unturned to find out who is responsible for the theft."

In a related development, a Las Vegas attorney who attended the news conference, reported that his client discovered a large sum of cash missing from his safety deposit box at Western Vault Corp. on Jan. 20. Donald Haight declined to identify his client or disclose the amount of money missing but said it was in five figures.

The drug theft is the first major controversy involving the intelligence bureau since Moran was elected sheriff in 1982. Since 1984 the bureau has spearheaded several undercover sting operations that have led to the conviction of more than 100 criminals. The bureau has gained the respect of law enforcement officials nationwide for its track record involving undercover operations.

Moran said the thefts have not rocked his confidence in the intelligence bureau. The bureau is made up of an elite corps of detectives who investigate street crime and organized crime activities.

"I have complete faith and trust in all members not only of the Metropolitan Police Department but the intelligence bureau," Moran said.

Haight said he was told by Western Vault Corp. that it has no sign-in and sign-out log at the Maryland Parkway facility and people can come and go without signing in.

He said boxholders can anonymously make deposits and withdrawals. They are given a key to the box, and a codename or a fingerprint card.

Haight said the police burglary and his client's loss are the only two thefts from the vault that he's aware of. He suggested that people keeping valuables at the vault check to see if they have anything missing.

Las Vegas Review-Journal
February 4, 1987, p. 1B

FBI JOINS PROBE INTO CHECKS THEFT

The FBI on Tuesday joined the Metropolitan Police Department's investigation into the theft of \$300,000 in blank travelers checks from a secret police vault.

Police learned Saturday that the American Express Travelers checks were missing along with an undisclosed quantity of cocaine from the safe-deposit box at Western Vault Corp., 2929 S. Maryland Parkway. The department's intelligence bureau used the box to keep travelers checks and narcotics used in undercover investigations.

The FBI entered the investigation because whoever stole the checks may be facing charges of interstate transportation of stolen property.

George Togliatti, a supervisor with the Las Vegas FBI office, said the FBI routinely works with the Police Department on cases involving the theft of jewelry, cars or negotiable instruments such as travelers checks. In such thefts the items are often taken across interstate lines.

Serial numbers of the blank travelers checks have been entered into national and international law enforcement computer systems, police said. None of the checks has been cashed or passed so far as authorities know.

Possible suspects in the theft include both police and employees of Western Vault Corp.

The Metropolitan Police investigation is being conducted by the department's detective bureau and the criminal intelligence section under the direction of Cmdr. Jerry Cunningham. Authorities said they do not know how long the investigation will take.

At a press conference Monday, Moran said the thefts have not rocked his confidence in the intelligence bureau.

Las Vegas Review-Journal
February 5, 1987, p. 1B

9 POUNDS OF COCAINE PART OF METRO HEIST

Almost 9 pounds of cocaine with an estimated street value of \$1 million were part of a theft from a Secret Metropolitan Police safe deposit box, sources said Wednesday.

Police learned Saturday that the drugs were missing along with \$300,000 in blank American Express travelers checks from a safe deposit box at Western Vault Corp., 2929 S. Maryland Parkway. The box was rented by the department's intelligence unit to secure travelers checks and drugs used in undercover operations.

Earlier this week, police officials declined to disclose the amount of cocaine taken. The almost 9 pounds of cocaine is 4 kilograms.

According to narcotics experts, the wholesale price for a kilogram of cocaine is about \$30,000. When it is broken down for user distribution, each kilogram has an ultimate street value of \$200,000 to \$250,000.

Possible suspects in the theft include both police and employees of Western Vault Corp. The police investigation into the thefts is being headed by Cmdr. Jerry Cunningham.

"We've had full cooperation from members of our intelligence bureau in this investigation," Cunningham said, "Western Vault has also been cooperative."

Two detectives with the intelligence bureau voluntarily submitted to a drug test in connection with the probe. The results of the test were negative, a police source said.

Authorities say that to their knowledge none of the checks have been cashed or have surfaced.

In a related development, Las Vegas attorney Donald Haight disclosed that one of his clients discovered \$90,000 missing from his safe deposit box at Western Vault Corp., on Jan. 20.

"It was his life savings and his father's life savings," Haight said.

The travelers checks and cocaine were part of a "flash roll" used to bait criminals in undercover investigations.

Las Vegas Review-Journal
March 12, 1989, p. 1B

OFFICER: VAULT HEIST TARGETED METRO STING

By Alan Tobin
Review-Journal

Four kilograms of cocaine and \$300,000 in blank travelers checks may have been stolen from a secret Metropolitan Police safe deposit box in an attempt to discredit a major undercover sting operation, according to court documents.

An affidavit filed in District Court by Det. Thomas Dillard, who was assigned to the investigation, states that the theft was not committed solely for financial gain.

Police discovered on Jan. 31 that the drugs and travelers checks were missing from the safe deposit box at Western Vault Corp., 2929 S. Maryland Parkway.

Whoever was responsible for the thefts had access to an additional 12 kilograms of the drug and another \$200,000 in travelers checks and jewelry that was being kept in the safe deposit box, but didn't take it, Dillard said.

"This leads (me) to conclude that the theft was made to discredit the STIFF (undercover) operation," Dillard said in the affidavit.

He was referring to the Special Trust Investigative Fund used to finance undercover sting operations.

Dillard also stated in the affidavit that business records show a relationship between five people targeted in a recent undercover probe and Western Vault Corp. President Grady Sanders. One of the targets is a Las Vegas attorney.

Attempts to reach Sanders for comment were unsuccessful.

According to narcotics experts, the ultimate value of 16 kilograms of cocaine is about \$4 million.

The safe deposit box was rented by the Police Department's intelligence unit to secure drugs and checks used by detectives in undercover sting operations.

At the time of the thefts, the department was conducting a major undercover sting code-named "Operation Pegasus." That investigation culminated Feb. 14 with the arrests of 89 suspects on various criminal charges. Among those arrested was reputed mobster John Vaccaro Jr.

Deputy Police Chief John Sullivan said Wednesday that the two detectives who had access to the vault have been cleared as possible suspects in the theft.

The drugs and travelers checks were kept in the safe deposit box for use as a "flash roll" or bait during sting operations. Targets in the sting were reportedly brought into the vault and shown the contents of the box.

To date, police have been unable to track down the person responsible for the thefts.

Dillard concluded that whoever stole the travelers checks and cocaine had a key to the police deposit box.

Police sources say that Sanders has not been fully cooperative with authorities investigating the theft.

Dillard also said in the affidavit Sanders told police that during his tenure at Western Vault Corp. he has ordered numerous vaults drilled open for various reasons including non-payment of rent, lost keys, problems with locks and to comply with court orders.

Dillard states in the affidavit that Sanders told police that narcotics were found in about 15 of the vaults he previously ordered drilled open. But police say the reported discoveries were never brought to their attention.

The Police Department has no record of narcotics ever being impounded at Western Vault Corp., Dillard said.

Las Vegas Review-Journal
March 26, 1987, p. 1B

VAULT FIRM TO CLOSE ITS DOORS

By Alan Tobin
Review-Journal

Hundreds of Western Vault Corp. customers apparently have cleaned out their safe-deposit boxes in the aftermath of a major theft of police property at the facility, which plans to close June 1.

The vault company became embroiled in controversy Jan. 31 when Metropolitan Police discovered 4 kilograms of cocaine with a street value of \$1 million and \$300,000 in blank travelers checks were missing from a secret police safe-deposit box being used in an undercover operation.

In a newspaper advertisement Wednesday, the vault company announced it intends to close June 1. The company is advising customers to remove property from safe-deposit boxes by that date.

In the ad, the company said the sting operation and the subsequent serving of the search warrants at the facility "have harmed Western Vault Corp. and the confidentiality of its clients."

"Accordingly, Western Vault Corp. feels that to prevent further breach of this confidentiality and to protect its customers, it now has no alternative but to cease business operations," the ad said.

Metropolitan Police officials denied breaching the confidentiality of the vault company's customers.

"We don't feel that what we did in serving our search warrants was as damaging as suggested in the newspaper advertisement," Police Department Cmdr. Jerry Cunningham said.

Western Vault Corp. President Grady Sanders could not be reached for comment.

In the ad, Western Vault Corp. said the police used the facility for the sting operation without the company's knowledge or consent.

A source close to the investigation said hundreds of customers have emptied and closed out their safe-deposit boxes since news of the thefts became public last month. Sources said Sanders is expected to file suit against the Police Department.

On Feb. 10, police opened numerous rented and non-rented safe-deposit boxes at the facility 2929 S. Maryland Parkway. They didn't find the missing checks and drugs.

In one of the non-rented boxes, police reportedly seized \$264,900 in U.S. currency.

The two undercover detectives who had direct access to the secret police safe-deposit box have been cleared of suspicion in the thefts by authorities assigned to the investigation. Sources close to the probe said they believe whoever is responsible for the thefts was unaware they were stealing from police.

Under state law, the vault company must exercise due diligence in trying to locate the owner of any unclaimed property left at the facility.

A spokesman for Nevada's Unclaimed Property Division said that upon dissolution of the business, any unclaimed property must be turned over to the division within one year. The state also tries to locate the owner and after a year has the option of auctioning the property.

The proceeds of the auction would be held for the owner. If the unclaimed property includes cash, it also is held for the owner or his heirs.

Las Vegas Review-Journal
March 31, 1987, p. 11B

A COLORFUL CAST OF CHARACTERS AWAITS THE SUMMER HEAT

By Ned Day

It's that time of year. A pleasant cool spell lulls certain citizens into the false hope that the inevitable searing heat of the high desert summer might never materialize.

But soon the heat will come.

Bone cooking heat, as if from some giant devilish oven, oppressive, demoralizing days, followed by sweltering, stuffy, supremely dangerous nights.

They are the kind of desert nights on which an obedient, long-suffering working girl might find herself gently fingering a butcher knife and eyeing the back of her pimp's sweat-soaked neck.

On such nights, you can hear the wild dogs howling outside the fences of the trailer courts along Boulder Highway, frightened rats scurry for cover, and the gay neon clown that towers over the Strip reverts to an ugly, sneering giggle.

On such nights in Las Vegas, the streets turn mean.

Ask Ray Slaughter, the private detective and polygraph expert now facing federal charges of selling cocaine to a winsome young woman half his age.

Slaughter is the man who administered a lie detector test to two Metro Police officers, clearing them of suggestions that they might know what happened to \$1.2 million in cocaine that is missing from a Metro vault.

The two undercover officers—two of the most daring and respected cops on the force—had stashed the drugs over at Western Vault Co. to be used by them to enhance their undercover masquerade as criminals.

Then, in late January, the stingers got stung. The drugs turned up missing from the Western Vault box.

Faced with a cloud of suspicion, the two cops volunteered for the lie detector tests; they retained Slaughter, took the test and were cleared.

A few weeks later, FBI agents went to work on Slaughter—with a comely young ingenue, alluring, tempting and wired for sound, ready to purchase cocaine.

On the mean streets, they call it the "honey trap."

According to a subsequent federal indictment, Slaughter fell for it and came across with the precious Colombian marching powder.

For Ray Slaughter, the hot summer started early.

But now, new developments threaten to turn the heat in another direction.

It all has to do with secret negotiations down in Tucson, Arizona, where tender Tammy Sue Markham is facing a number of federal drug-related charges.

Little Tammy Sue, you see, happened also to have been a client of the Western Vault Co., at the same time the Metro drugs were stolen.

Now, she's in trouble with the FBI, the Drug Enforcement Administration, and U.S. customs.

A short time ago, some \$250,000 in cash was seized by the government from Tammy Sue, seized from a safety deposit box at Western Vault Co. in Las Vegas.

The money was found inside one of Tammy Sue's suitcases, a suitcase that also contained some of her identification.

But it was sort of odd, you see.

Because Tammy Sue's suitcase and money were not found where they were supposed to be—inside one of the safety deposit boxes that she rented from Western Vault.

Tammy Sue's suitcase full of cash was found in Box 1226, which was not one of her boxes. In fact, according to Western Vault records, Box 1226 was not being leased by anyone when her money was located inside Box 1226.

Very strange, indeed.

But our mystery only gets stranger.

Just last week, Tammy Sue, her lawyer and agents from the FBI, Drug Enforcement Administration and U.S. Customs showed up at the Western Vault Co.

Tammy Sue led them to three safety deposit boxes that she had been renting from Western Vault. Inside those boxes, she told the agents, they would find much cash and gold coins—with a value estimated in excess of half a million.

Tammy Sue was wrong.

Like the Metro box that had been emptied of its cocaine, Tammy Sue's three deposit boxes also contained nothing but air.

What happened to her loot?

This brings us to Beatriz Connick, a Colombian national now living in San Diego. Ms. Connick is not facing any drug related charges.

But she did have a safety deposit box at Western vault, one that also is empty.

Ms. Connick has taken and passed a police-sponsored lie detector test to substantiate her assertion that her box was not always empty, that, in fact, it once contained such booty—booty now mysteriously missing.

What a wonderful cast of characters who now contemplate the coming summer season.

Determined Metro sleuths, hunting for a million in missing drugs; two daring, hard-nosed, street-wise under-

cover coppers still under a cloud; grim-faced, grey-flannel FBI agents and their colleagues in DEA and Customs.

Veteran Las Vegas private eye Ray Slaughter, an indicted, desperate man who knows much about the sleazy underbelly of our town; a comely young ingenue and snitch, presumably no longer wired for sound.

Tender Tammy Sue Markham of Tucson, Arizona; Ms. Beatriz Connick, the mysterious Colombian national now living in San Diego.

And, of course, handsome, smooth-talking Grady Sanders, the flamboyant entrepreneur who owns Western Vault, along with a stable of thoroughbreds, a Rolls Royce and the other perks of prosperity.

They all wait, nerve-ends rubbed raw.

Wait for that oppressive, demoralizing, hot summer wind that spews out of a nameless devil's oven, wraps itself around the Sheep Mountain Range and whips into our valley, scorching the minds, bodies and souls of high desert rats who compete for advantage on the mean streets of Las Vegas.

Las Vegas Review-Journal
July 21, 1987, p. 1E

METRO PREPARES CASE IN COCAINE, CHECKS THEFT

By Alan Tobin
Review-Journal

Metropolitan Police say they hope to submit a case shortly for prosecution in the theft of \$1 million worth of cocaine and \$300,000 in blank travelers checks from a secret police safe-deposit box.

Police discovered 4 kilograms of cocaine missing along with the travelers checks from a safe-deposit box rented from the Western Vault Corp. on Jan. 31. The checks and drugs were part of a "flash roll" used by officers in an undercover investigation to bait criminal suspects.

After news of the thefts became public, hundreds of customers emptied and closed out their safe-deposit boxes at the facility, formerly located at 2929 S. Maryland Parkway.

The vault company closed for good in June. At the time, Western Vault President Grady Sanders said he was closing the company because it "could not survive a major scandal."

Police Capt. Paul Connor said detectives have interviewed dozens of people in connection with the investigation.

"We are optimistic that we are making progress and hope soon to have a case to present to the district attorney," Connor said.

Earlier this year, investigators cleared the two undercover detectives, who had access to the safe-deposit box, of any suspicion. Connor would not comment on whether Sanders will be charged.

"It's premature to say what charges and who will be charged," Conner said. "We have to wait until we have the final results of our investigation and all the evidence is obtained."

Conner said police still hope to recover the property taken from the safe-deposit box.

"We always held the [copy illegible in original] that we will be able to recover the property taken," Conner said. "Sometimes you have a burglary and after six years you haven't found the property. Then after six years and two months you recover it."

Privately, police experts have expressed several theories for the theft.

An affidavit filed in District Court by Detective Thomas Dillard in February suggested that the theft was done to discredit a major police sting operation. Dillard noted that whoever was responsible for the theft had access to an additional 12 kilograms of cocaine and another \$200,000 in travelers checks and jewelry that was being [copy illegible in original] did not take it.

Others have speculated that the thefts were committed by someone who had no idea that he was stealing from undercover police. They theorize that whoever was responsible for the thefts may have been looking for a large cache of allegedly stolen bearer bonds or drugs.

Undercover officers were conducting investigations involving both shortly before the theft from the vault was discovered.

Las Vegas Review-Journal
February 6, 1988, p. 1A

VAULT OWNER INDICTED IN DEPOSIT BOX THEFTS

By Alan Tobin and Warren Bates
Review-Journal

The owner of the defunct Western Vault Corp. was indicted Friday on charges of stealing cocaine, travelers checks, cash and jewelry valued at more than \$3 million from safe deposit boxes rented by Las Vegas police and several private customers.

Grady Sanders was the only defendant named in an 11-count indictment returned by the Clark County grand jury. He is charged with two counts of racketeering, one count of trafficking a controlled substance and eight counts of grand larceny.

He was released on his own recognizance and is scheduled to appear Feb. 22 before District Judge Earle White where he is expected to post \$100,000 bail.

Sanders was the only owner of Western Vault, 2929 S. Maryland Parkway, when police discovered almost 9 pounds of cocaine valued at \$700,000 and \$300,00 in blank American Express Travelers checks missing on Jan. 31, 1987, from a police safe deposit box being used in an undercover investigation.

The drugs and the checks were part of a "flash roll" used by Detective Steve Scholl and Sgt. Ed Schaub to gain the confidence of narcotics suspects and other criminals.

After the theft from the police safe deposit box was discovered, seven other Western Vault customers reported that \$2.2 million in cash and jewelry had been stolen from their boxes.

The indictment was the result of a yearlong investigation headed by Chief Deputy District Attorney Robert Teuton.

Sanders, accompanied to court Friday by attorney Dominic Gentile, declined to talk to reporters.

However, Gentile later held a press conference and said he will present evidence at trial proving that Scholl stole the drugs and travelers checks from the police safe deposit box.

"There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express travelers checks than any other living human being," Gentile said.

"And I have to say that I feel Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the district attorney's office."

Shortly after the theft, police investigated and cleared the two detectives, both of whom had immediate access to the safe deposit box. Both reportedly passed lie detector tests.

"I don't know on what basis (Gentile) is making those allegations," Deputy Chief John Sullivan said at a Friday afternoon press conference. "Was he able to explain away the other thefts from the vault or did he say Steve Scholl was responsible for those?"

Lt. Loren Stevens of the Police Department's intelligence services bureau, who supervised both Schaub and Scholl, defended the two detectives but declined to discuss specifics of the case.

"The appropriate arena for this case is in the courtroom," he said. "Those of us who are assigned to this investigation will certainly show up for the trial and that's where any and all evidence germane to the case should be presented."

Western Vault closed operations in June after Sanders said the sting operation and resulting publicity ruined his business.

Police think there are other former vault customers who had valuables stolen but have not contacted police.

To date, neither the drugs nor the stolen property has been recovered, Sullivan said.

"The drugs certainly were dispersed with the community or the country a very short time afterward," he said.

Sullivan said he doubts Sanders had any idea he was stealing from police.

Gentile said that in past sting operations conducted by the FBI, Drug Enforcement Agency and U.S. Customs authorities, Sanders had always been notified of the probes.

He suggested that Las Vegas police were "playing fast and loose" and had not told Sanders they were undercover.

Gentile also questioned the credibility of four of the victims named in the grand jury's indictment. He said they were known drug dealers and money launderers.

Sullivan said a background check on Sanders before the safe deposit box was rented gave them no reason to believe the contraband was at risk.

"Contrary to our initial information from Western Vault we found early on that there were several duplicate keys," he said. "It would be easy for somebody to gain access.

"We felt confident that that amount of cocaine would be secure in that environment. We found out we were wrong."

After the theft, some federal law enforcement officials privately suggested that police were outsmarted in an exchange with drug dealers and used the theft as an alibi. Others said they suspected the officers stole the drugs and the checks.

As a result, relations between some police and federal authorities have been strained. Police hope the indictment will quell the suspicions.

The drug trafficking charge carries a sentence of 15 years to life imprisonment and a \$250,000 fine. Each grand larceny charge carries a one- to 10- year sentence. Each racketeering count has a 5- to 20-year penalty.

If convicted Sanders also faces forfeiture of his business and personal holdings.

Las Vegas Sun
February 2, 1987, p. 1A

LOOT, DRUGS STOLEN FROM METRO SAFE

By Ed Koch
SUN Staff Writer

Cash, jewelry and drugs apparently have been stolen from a safety deposit box issued to the Metro Police Intelligence Bureau.

Sheriff John Moran said Sunday that "something is missing and that we are still piecing together all of the facts before we make a statement."

Moran said he will disclose the details in a press conference Monday.

Media reports have placed the value of the cash, jewelry and drugs taken from the safety deposit box at around \$250,000, but that could not be confirmed.

The items kept in the safety deposit box at the Western Vault Corp., 2929 S. Maryland Parkway, were believed to have been used as bait during a "sting," an undercover operation where police pose as the criminal element to capture suspects.

There is an unconfirmed report that an apartment used by the Intelligence Bureau to conduct a sting operation also was burglarized.

There apparently was no forced entry in the safety deposit box burglary. When the apparent burglaries occurred was not disclosed.

It was not known if there are any suspects in the alleged thefts.

Moran said that he has discussed the incident with members of his staff, but would wait until the press conference before discussing the facts of the case.

The Intelligence Bureau has gained much attention over the past two years for its successful stings of street criminals and robbery and burglary fencing operations.

Some of the sting operations have been funded by community businesses that donated money to Intelligence Bureau representatives specifically for the covert activities.

Las Vegas Sun
February 3, 1987

METRO POLICE STUNG IN BURGLARY OF SAFE

By Ed Koch
SUN Staff Writer

Calling Metro Police "the victim" of a crime, Sheriff John Moran said Monday that some \$300,000 worth of blank travelers checks and an unspecified amount of drugs were stolen from a safety deposit box rented by the Metro Intelligence Bureau.

Moran made his statements at a press conference following published reports Monday of the burglary Saturday of the box in the Western Vault Co. at 2929 S. Maryland Parkway.

The American Express Travelers checks, on loan to police from the company, were part of what Moran called a "flash roll" used during undercover sting operations.

The checks and unspecified type of drugs are "flashed" by undercover police officers posing as the criminal element. As part of the sting operation, they escort criminal suspects to the vault to prove they have the financial backing to assist them.

Moran denied reports that cash and jewelry were taken from the safety deposit box. He further denied reports that an apartment used by police to carry out their covert operations was burglarized.

Moran confirmed, however, that there was no forced entry to the safety deposit box.

He said his department will not have to reimburse American Express unless the checks are cashed. He said that the numbers on the travelers checks have been reported to law enforcement agencies nationwide.

Despite the obvious embarrassment of the police becoming burglary victims, Moran defended the Intelligence Bureau and the department.

"I have complete faith and trust in the investigation (into the burglary)," Moran said. "And I have trust and faith in the Intelligence Bureau."

Asked if any of his officers had been disciplined in connection with the burglary, Moran said, "Absolutely not."

"Metro is the victim, and the investigation will be handled like any other criminal investigation," he said.

Moran addressed the press conference following a staff meeting Monday morning. In a one-page press release, he indicated that the undercover investigations were "ongoing." He did not indicate how the theft will effect those investigations.

Moran said that access logs maintained by Western Vault were seized by search warrant after one of the Intelligence Bureau officers discovered the burglary.

He said that only Intelligence Bureau officers and Western Vault employees were supposed to have keys to the safety deposit box.

Donald Haight, an attorney representing an unidentified man who claims a substantial sum also was missing from his box at Western Vault, said he was told by the company's officials that no access logs existed.

An attempt to reach Western Vault for comment was unsuccessful.

A Metro official said that undercover officers rented a safety deposit box because, for obvious reasons, they couldn't bring potential criminal suspects to the police station to show them the bait checks and drugs.

Las Vegas Sun
February 4, 1987

FBI WILL PROBE SAFE BURGLARY

By Ed Koch
SUN Staff Writer

The FBI launched Tuesday an investigation into the burglary of \$300,000 worth of travelers checks from a safety deposit box rented by the Metro Police Intelligence Bureau.

"Because of the volume of the items missing and because of the potential interstate use of the stolen travelers checks, we are joining Metro in the investigation of the burglary," said FBI spokesman Mike Growney.

He added that the FBI's investigation will be separate from Metro's probe into the Saturday heist at the Western Vault Co., at 2929 S. Maryland Parkway, but that the law enforcement agencies will share their findings.

Also taken from the safety deposit box during the burglary was an unspecified amount and type of drugs. There was no forced entry to the box.

The American Express travelers checks, on loan to police from the company, and drugs were part of what police call a "flash roll" used during undercover sting operations.

The checks and drugs are "flashed" by undercover police officers posing as the criminal element. As part of the sting operation, they escort criminal suspects to the vault to prove they have the financial backing to do business with them.

Growney said that FBI officials met Tuesday with representatives from American Express and had contact with Metro officials about the matter sometime earlier.

"We are not joining the investigation because Metro is the victim," Growney said. "It is normal policy that

the FBI would become involved in the investigation of stolen travelers checks valued at \$50,000."

Growney said, however, that they have become involved in such an investigation "a little sooner" than normal because of the potential use of the stolen checks in other states, which is a federal offense.

Growney said that the theft of the checks alone is not a federal crime, unless they were taken from a bank, post office or federal facility.

He also said that until a travelers check is cashed, investigators probably would have no leads to their whereabouts except for whatever clues were left at the crime scene.

Metro Sheriff John Moran said that his department will not have to reimburse American Express unless the checks are cashed. He said that the numbers on the travelers checks have been reported to law enforcement agencies nationwide.

None of the checks has been reported cashed.

Las Vegas Sun
February 12, 1987

METRO USES DOGS TO SEARCH SAFES

By Harold Hyman
SUN Staff Writer

Armed with search warrants and two dope sniffing dogs, Metro Police opened dozens of lock boxes at Western Vault Corp., 2929 S. Maryland Parkway, but failed to find several pounds of cocaine that had been stolen from their own lock box there, it was disclosed Wednesday.

The exhaustive search, in which many of the suspect lock boxes had to be drilled open by a locksmith, was conducted from 1:30 p.m. to 11 p.m. on Tuesday, according to Metro chief of detectives Jerry Cunningham.

Cunningham is leading the investigation personally and was present when the lock boxes were opened.

"We found no narcotics. We still have a lot of leads that we are pursuing, Cunningham said, but indicated nothing came of the vault search.

Metro undercover officers had kept between two and four kilos of cocaine, plus \$300,000 in travelers checks, in the lock box they had rented at the commercial public vault, but discovered the box empty Feb. 7.

After questioning the undercover officers who had access to the lock box, and reportedly satisfied they were not involved in the theft, Metro investigators focused on vault company employees who also had keys.

They were said to have assumed that if vault company employees were involved, they would not risk removing the stolen cocaine but would keep it under lock and key

on the premises, at least temporarily until the investigation cooled.

A search warrant for all empty lock boxes in the vault was obtained and two dogs trained to detect drugs were used to indicate which boxes to open.

Las Vegas Sun
March 11, 1987

REWARD OFFERED IN VAULT CASES; 2 OFFICERS CLEARED

By Ed Koch
SUN Staff Writer

Metro Police, in an effort to rejuvenate a one-month old investigation into the theft of illegal drugs and traveler's checks from a safety deposit box issued to the department's Intelligence Bureau, offered Tuesday a reward through Secret Witness.

Metro Commdr. Jerry Cunningham also said that the two officers who were issued keys to the safety deposit box at Western Vault Co., 2929 S. Maryland Parkway, have passed polygraph tests.

Some \$300,000 worth of American Express Traveler's checks and a reported \$1 million worth of cocaine were taken from the vault company box in early February, police said.

"I authorized Secret Witness to offer the standard reward (up to \$1,000) today," Cunningham said. "We didn't offer the reward before because there was enough interest over the incident and someone could have come forward.

"But since the furor has died, we believe it's time to offer a reward. We have no intention of abandoning this investigation."

The box was issued to the Intelligence Bureau to stash what police call a "flash roll," which is used as bait to catch wrongdoers during sting operations.

Cunningham said that none of the checks have been reported cashed since the burglary.

"We are satisfied that our officers were not involved in the burglary," Cunningham said. "Their answers (to questions during the lie detector tests) appeared truthful and not dubious."

Cunningham said that lawyers for Western Vault have declined a police invitation for that company's employees to take the polygraph tests. He said the company has requested to see the questions before the employees are allowed to be tested.

The validity of the controversial polygraph tests has been questioned in some circles, and the results are not allowed as evidence in court cases.

In another development, Cunningham said that a safety deposit key issued to police by the vault company was duplicated by a local locksmith who told them that similar copies could be made by a key duplicating machine in a department store.

Cunningham said police were told that security keys could not be duplicated. However, during the burglary investigation, a plain clothes officer, posing as a customer to the locksmith, received a duplicate of the Western Vault-issued key, Cunningham said.

Las Vegas Sun
March 26, 1987 (Date listed in Record not on Original)

BURGLARIZED VAULT FIRM CLOSES DOORS

Western Vault Corp., used by police in a secret drug sting operation, is closing on June 1.

Customers of the private vault company are being advised to remove all property from their safe-deposit boxes by that date.

A published advertisement said police had used lock boxes at Western Vault for a sting operation without the knowledge or permission of the company. The firm said its business had been damaged by the police activity.

The sting operation became public when \$1 million worth of drugs and \$300,000 in travelers checks were stolen from the police safe deposit boxes.

The thieves have never been identified.

Hundreds of Western Vault customers closed accounts after learning of the theft, company officials said. Subsequently, police obtained search warrants to open numerous boxes at the vault company during an investigation into the theft.

Las Vegas Sun
January 7, 1988, p. 5B

SLAUGHTER CASE RAISES MORE QUESTIONS THAN ANSWERS

Jeff German

Until about eight months ago, Ray Slaughter was riding high as the city's premiere polygraph examiner.

He worked and socialized with just about everyone of importance in the justice system—lawyers, cops, judges and FBI agents.

His world caved in last April 28, when he was arrested on charges of distributing roughly a half-ounce of cocaine to a beautiful woman who had befriended him while working undercover for the FBI.

Slaughter, though respected professionally, had established a reputation as a man who liked to party.

He was a regular at such after-work courthouse hangouts as T.K. Christy's and The Prime Rib. He often socialized at those hotspots with some of the same FBI men who arrested him.

His friends say Slaughter basically had two weaknesses—attractive women and allegedly cocaine.

While Slaughter reportedly used cocaine himself, he was anything but a big-time drug dealer.

The FBI agents who took him into custody April 28 knew that.

They weren't even after Slaughter. They were trying to hook bigger fish—some of the judges, the cops and the lawyers who had been hanging around with Slaughter.

Members of the FBI's Political Corruption Squad in Las Vegas spent a lot of time and effort to catch their former drinking buddy.

Agents even offered Slaughter a pass on the drug charges if he would give up his friends. They wanted to wheel and deal.

They were particularly interested in the results of a Slaughter-administered polygraph exam that had cleared two Metro intelligence officers of wrongdoing in the controversial rip-off of an undercover safe deposit box at the now-defunct Western Vault Corp.

Slaughter refused to cooperate and chose to fight the charges, instead.

Later this month, he's scheduled to stand trial in federal court.

There's little question he faces an uphill battle.

The government has tapes of Slaughter discussing the alleged drug deal with its undercover informant, Belinda Antal, a shadowy blonde bombshell who had cozied up to Slaughter under the FBI's watchful eye.

Antal, who claimed to be an unemployed casino industry worker, wore a body recorder while she allegedly badgered Slaughter into getting her the white stuff from his local connection.

I'm told the tapes are embarrassing to the likeable polygraph expert. He did a lot of bragging to the beguiling Antal. He said the kinds of things most men say in pursuit of a beautiful woman.

But when Slaughter goes to trial, his guilt or innocence, though important to him, may take a back seat to the bigger picture here.

What may be far more interesting to courthouse observers is the way FBI agents targeted and ensnared this mover and shaker in the legal community.

A lot of unanswered questions remain.

Why was the FBI's Political Corruption Squad so heavily involved in this minor league drug case?

How does the government indeed go about selecting its targets?

Why was Slaughter's well-known cocaine supplier allowed to go free and continue practicing his trade?

Is the government serious about making a dent into the drug trafficking problem in this country?

Or is it content to apply its drug enforcement powers toward other more glamorous goals?

Is it proper for law enforcement authorities to use gorgeous women to entice a man into committing a crime? And vice versa?

How many love-starved singles out there could resist such temptation?

These aren't unmeasurable questions to ask.

The citizenry's ability to scrutinize the conduct of its government is rooted in the First Amendment. It's what makes this country great.

Ray Slaughter already has paid dearly for his mistake.

As his trial gets underway in the days ahead, maybe we ought to consider whether our government has been honest with us in this case, too.

Las Vegas Sun
January 21, 1988, p. 5B

A COINCIDENCE? SLAUGHTER NAILED AFTER FLUNKING FBI AGENT IN LIE TEST

Jeff German

Has the saga of Ray Slaughter sagged into the depths of the "Outer Limits?"

Maybe so.

As it turns out, the embattled polygraph examiner tested a Las Vegas FBI agent accused of illegally using drugs and failed him several months before Slaughter himself was set up by the FBI on narcotics charges.

I'm told the agent, Derrick K. Neal, had been the subject of an internal FBI probe based in Washington in 1986. He reportedly flunked two FBI-administered lie detector exams as well.

Though no criminal charges apparently ever were filed against Neal, he quietly was transferred out of Las Vegas in November 1986. He's been stationed at the FBI's field office in Los Angeles since then.

Neal through his Las Vegas attorney Stan Hunterton, refused comment, citing the FBI's longstanding policy of not discussing internal investigations.

A spokesman for the FBI in Washington also declined to discuss the case.

But other informed sources said the agent, who had been working drug cases in Las Vegas, had come under scrutiny for lying about alleged illegal drug use on annual internal FBI questionnaires in 1984 and 1985. He had entered active FBI duty July 24, 1983.

Hunterton, a highly regarded former federal prosecutor, and his law firm had asked Slaughter to test Neal in June 1986 to refute the two failed FBI exams.

Among other things, Neal reportedly had been accused of smoking marijuana at a 1987 Christmas party and asking an informant to get his girlfriend some drugs.

Neal denied ever using illegal narcotics or providing them to anyone, and he claimed he had been badgered into making certain admission of guilt by the FBI's own polygraph examiners.

But despite that, Slaughter concluded that Neal had lied to him when directly confronted about his alleged drug use.

Slaughter made out a report on his findings June 12, 1986. It showed that Neal was well within the generally accepted area of deception on many of the key questions.

Just what kind of disciplinary action the FBI took against Neal is not known.

Maybe it's just a coincidence, but in April 1987, FBI agents assigned to the bureau's Political Corruption Squad in Las Vegas ended up arresting Slaughter on drug charges.

Slaughter, a courthouse mover and shaker who had a reputation for partying, was charged with distributing about a half-ounce of cocaine to an undercover informant on several occasions.

The undercover operative, Belinda Antal, was a beautiful woman who had befriended Slaughter at the FBI's request for the sole purpose of ensnaring the politically connected polygraph examiner in the drug deal.

Slaughter, I'm told, flat out admits he frequently used cocaine, but he denies ever being a trafficker.

As for the real drug dealer in the set-up, the man who allegedly sold Slaughter the cocaine for Antal, FBI agents conveniently forgot to include him in their drag-net.

All this, of course, makes you wonder why agents felt the need to manufacture a drug case against Slaughter when they apparently had a ready-made case in their own house.

But in the "Outer Limits," anything is possible, I guess.

Las Vegas Sun
January 28, 1988, p. 5B

SOMETHING'S COOKING AT THE COURTHOUSE

Jeff German

As courthouse battles go, it's likely to be a blockbuster.

So don't go away.

Before too long, things are going to get about as hot around here as a bowl of sizzling rice soup.

Local prosecutors are zeroing in on an indictment in a top-secret grand jury probe of last year's incredible theft from a police safe-deposit box at the old Western Vault Corp.

In all \$1 million worth of cocaine and \$300,000 in travelers checks earmarked for undercover intelligence investigations were stolen.

This is anything but a simple story, but here's what I've been able to piece together.

Las Vegas businessman Grady Sanders, president of the vault company, is the key target of the super-sensitive probe being spearheaded by Chief Deputy District Attorney Bob Teuton.

Sanders, a prominent UNLV booster, has hired powerhouse attorney Dominic P. Gentile to convince prosecutors there's good reason to derail the pending indictment.

But so far, though they're listening to Gentile, prosecutors are bent on seeking the indictment in the near future, maybe sooner than we think.

From here on, the story gets tricky.

Sanders, I'm told, outright denies having anything to do with the theft. He's been openly critical of the way

police handled the investigation from the outset. He's even lost business over it.

Furthermore, both Sanders and Gentile are convinced that two intelligence detectives who had access to the safe deposit box stole the goods. They believe there's no more evidence against Sanders than the cops.

Even more interesting, despite his past denials, Sanders now is prepared to admit he's maintained a long-standing cozy relationship with FBI agents.

He's willing to admit he indeed has voluntarily cooperated with agents in past investigations and that he still keeps close ties with them.

It was reported here last June that Sanders, at the FBI's request, once tried to ensnare former state Sen. Floyd Lamb in an undercover sting. Lamb didn't take the bait, but he later was indicted and convicted in another political corruption case.

The warm relationship between Sanders and the FBI is important because agents also are said to be operating under the theory the intelligence officers may be the real culprits in the vault theft.

Though agents reportedly haven't uncovered any solid evidence against the cops, they're said to be still digging.

Last April, for example, they set up longtime Las Vegas polygraph examiner Ray Slaughter on drug charges with the hopes, in part, of getting him to cooperate in the case. Slaughter earlier had cleared the two officers of wrongdoing with a polygraph test.

When he refused to cooperate, the FBI pressed ahead with charges. His trial, originally set to get under way in federal court this week, has been delayed indefinitely.

Meanwhile, the DA and Metro Police have revved up the afterburners in the case against Sanders, unfettered by the FBI's potentially menacing presence.

The two cops are being backed all the way by their supervisors, who are convinced Sanders is the main suspect.

As the DA's explosive grand jury investigation draws to an end, it seems destined to rip apart relations between Metro's elite Intelligence Bureau and the FBI.

Already, there are signs of tension and distrust between the two.

Several intelligence detectives privately have been criticizing the FBI for independently pursuing the case against the cops, when the evidence they believe points more to Sanders, the FBI's man.

In the days ahead, expect the fireworks to escalate, as the battle between Sanders and the cops burns a scorching pathway through the heart of the courthouse.

I'm afraid the remnants of this blockbuster will be with us for a long time.

Las Vegas Sun
February 5, 1988, p. 5B

SLAUGHTER CASE STIRRING MORE COURTHOUSE RUMBLINGS

Jeff German

They're shakin' and bakin' at the federal courthouse right about now.

Hot, hot, hot. Here's the lowdown.

Assistant Federal Public Defender Randall Roske, another one of those gutsy criminal lawyers, has dumped a batch of sizzling subpoenas on the U.S. Marshals Service.

Once these hot potatoes are served, they're likely to rattle the cages of more than a few G-men at the courthouse as the explosive drug trial of polygraph man Ray Slaughter gets under way later this month.

From what I hear, the prosecutor in the Slaughter case, Chief Assistant U.S. Attorney L.J. O'Neale, already is feeling a few aftershocks.

The other day, O'Neale banned Roske's controversial investigator in the case, Jack Ruggles, from his office.

Word reportedly got back to the prosecutor that Ruggles had been checking out some interesting rumors about him during the course of the defense investigation.

Those rumors turned out to be unfounded.

So who's on the list of witnesses Roske wants the marshals to subpoena in Slaughter's trial?

For starters, there's former U.S. District Judge Harry Claiborne, Sheriff John Moran, ex-homicide detective Chuck Lee and Metro Intelligence Lt. Loren Stevens.

Also on the list are Intelligence Sgt. Ed Schaub and Detective Steve Scholl, key figures in the theft of cocaine and travelers checks from a police safe deposit box at the Western Vault Corp.

Over the years, Slaughter, in one way or another, has helped the above subjects clear themselves of suspicious activities alleged by the FBI and its informants.

For example, in 1982 Slaughter tested Moran and concluded the sheriff was telling the truth when he denied that he had received a \$40,000 campaign contribution from the late reputed mobster Anthony Spilotro.

Last year, the polygraph examiner found that Schaub and Scholl told the truth when they insisted they didn't steal four kilos of cocaine and \$300,000 in travelers checks from the police safe deposit box.

Slaughter also once backed Lee, a respected polygraph expert in his own right, who had cleared Claiborne of wrongdoing early on in the Justice Department's convoluted probe of the judge.

Lee later was targeted by the FBI in an offshoot of the Claiborne investigation.

Claiborne ultimately was convicted on tax evasion charges, but not before he repeatedly alleged he was the victim of a government vendetta.

By calling Claiborne and company, Roske hopes to show that Slaughter, a longtime courthouse heavyweight, was targeted by FBI agents because he didn't call things the way they saw it.

Slaughter was arrested last April by agents assigned to the FBI's Political Corruption Squad.

He was charged with distributing roughly a half-ounce of cocaine to a beautiful undercover operative on several occasions.

Some now are suggesting Roske is trying to put on a "smokescreen defense" designed to divert attention away from the drug charges against Slaughter.

But Roske is deadly serious about proving his client was set up for political reasons.

If he can get his witnesses on the stand things may be shaking at the federal courthouse for a long time.

Las Vegas Sun
February 6, 1988, p. 1A

METRO MISSING \$1.3 MILLION IN DRUGS, CHECKS

JURY INDICTS VAULT OWNER ON \$2.5 MIL. THEFT CHARGE

By Pauline Bell
and Harold Hyman
SUN Staff Writers

The owner of the now defunct Western Vault Corp. was indicted by a Clark County grand jury Friday on charges he stole \$2.5 million in cash, coins, jewelry and other merchandise, including about \$1.3 million worth of drugs and travelers checks belonging to Metro Police, from safe deposit boxes at the business.

However, the attorney for businessman Grady Sanders said his client is being set up as "the scapegoat" for the Metro detective who really stole the checks and cocaine. Evidence presented at trial will prove Sanders innocent, said defense lawyer Dominic P. Gentile.

Sanders, accompanied by Gentile, was present in the courtroom of Chief District Judge Myron Leavitt when the indictment was returned. The 51-year-old Las Vegas surrendered to authorities, was formally booked on the charges in the 11-count felony indictment, and was later released on his own recognizance.

The judge set Sanders' bail at \$100,000 and gave him two weeks to secure it.

Sanders is scheduled to be arraigned in the courtroom of Judge Earle White Feb. 22 on two counts of racketeering, eight counts of grand larceny and one count of trafficking in a controlled substance.

Metro undercover officers rented a safety deposit box at the company at 2929 S. Maryland Parkway and used

it to store American Express travelers checks and four kilos of cocaine used in undercover drug sting operations. The checks and drugs were discovered missing early last year.

Additionally, the indictment charges Sanders with stealing some \$1.2 million worth of jewelry, commemorative coins, silver, gold and cash from seven people who rented safety deposit boxes at the company in 1985, 1986 and 1987.

In a news conference after the indictment was returned, Gentile said Sanders is innocent of all charges against him.

The defense attorney said he has evidence that will prove that Metro Detective Steve Scholl, one of the undercover detectives who had access to the safety deposit box, "is most likely responsible for the theft."

He describes Scholl as being in "the most direct position" to have access to the drugs and checks.

The indictment of Sanders is an effort by Metro officials to "get themselves out of trouble" and to cover up the wrongdoing of one of their own, he alleged.

As for the other alleged theft victims, Gentile said some four of them are known drug dealers and money launderers who would have had ulterior motives for claiming they had money and other property stolen from the boxes.

Gentile implied that some of the alleged stolen property may never have been in the boxes in the first place, and he mentioned insurance fraud as one possible motive for the other victims reporting property missing.

Chief Deputy District Attorney Bob Teuton, responding to Gentile's allegations that authorities are making Sanders a scapegoat, said the indictment is a legitimate one.

Prosecutors can't bring an indictment to court unless they can prove the charges in it beyond a reasonable doubt, he said.

Metro officials also adamantly denied Gentile's assertions.

"We in Metro are very satisfied our officers (Scholl and Sgt. Ed Schaub) had nothing to do with this theft or any other. They are both above reproach. Both are veteran police officers who are dedicated to honest law enforcement," said Metro Deputy Chief John L. Sullivan.

KLAS, TELEVISION CHANNEL 8, SUMMARY OF NEWS BROADCASTS REGARDING THE SANDERS CASE.

SYNOPSIS OF KLAS STORIES REGARDING GRADY SAUNDERS (SIC) AND WESTERN VAULT.

1-11-83: PROFILE OF NEW WESTERN VAULT, DESCRIPTION OF SECURITY SYSTEMS AND INSURANCE FOR CUSTOMERS. ALSO STORY INDICATES HOW CUSTOMERS' PRIVACY IS MAINTAINED BECAUSE NO NAMES ARE USED IN ENTRY TO THE VAULT, JUST FINGERPRINTS.

3-10-87: NED DAY REPORT ABOUT A METRO AFFADAVIT THAT DESCRIBES GRADY S. AS UNWILLING TO COOPERATE IN THE INVESTIGATION OF THE VAULT BURGLARY. AFFADAVIT ALLEGES THAT SAUNDERS DRILLED BOXES WITHOUT THE PERMISSION OF THE CUSTOMERS AND AT LEAST 15 TIMES, FOUND ILLEGAL DRUGS BUT DID NOT INFORM POLICE. ALLEGES THAT SAUNDERS REFUSED TO TURN OVER DOCUMENTS TO POLICE, ALSO QUOTES SAUNDERS AS SAYING THAT DRUG SNIFFING DOG IN WESTERN VAULT WOULD BE "WORN OUT." STORY ALSO DESCRIBES SAUNDERS VARIOUS BUSINESS INTERESTS.

3-10-87: CONTINUATION OF ABOVE STORY IN WHICH SAUNDERS RESPONDS TO AFFADAVIT ALLEGATIONS. HE DENIES EVER DRILLING INTO BOXES, ACCUSES POLICE OF TRYING TO SHIFT THE BLAME AWAY FROM THEMSELVES, LAMBASTS METRO FOR DARING TO RUN A STING OPERATION IN HIS VAULT WITHOUT HIS PERMISSION, POSSIBLY ENDANGERING CUSTOMERS.

6-1-87: STORY ABOUT THE CLOSURE OF WESTERN VAULT. WHILE SAUNDERS WOULD NOT COMMENT, METRO COMMANDER CUNNINGHAM IS QUOTED AT LENGTH EXPLAINING THAT SAUNDERS REFUSED TO COOPERATE, REFUSED TO TAKE A POLYGRAPH, HAS REFUSED TO ANSWER QUESTIONS TO METRO'S SATISFACTION. CUNNINGHAM SAYS METRO IS CONVINCED THE THEFT WAS SOME SORT OF INSIDE JOB—'WESTERN VAULT INVOLVEMENT'. HE ALSO SAYS INVESTIGATORS HAVE UNCOVERED INCRIMINATING EVIDENCE BUT NOT QUITE ENOUGH TO PINPOINT AN EXACT SUSPECT. REPORTER INDICATES THE PROBE IS FAR FROM OVER.

10-8-87: EYEWITNESS NEWS HAS LEARNED THAT THE CLARK CO. GRAND JURY BEGAN HEARING TESTIMONY INTO THE VAULT CAPER, SOURCES INDICATE THE FOCUS OF THE PROBE IS WESTERN VAULT ITSELF. INVESTIGATORS BELIEVE W. VAULT ALLOWED THE UNAUTHORIZED OPENING OF BOXES, INCLUDING THE METRO BOX. STORY MENTIONS OTHER CUSTOMERS WHO SAY THEIR BOXES WERE RIFLED. THOSE VICTIMS ARE EXPECTED TO TESTIFY. SAUNDERS COULD NOT BE REACHED FOR COMMENT.

2-5-88:
GENTILE NEWS CONFERENCE STORY. GENTILE COMPARES THE W. VAULT BURGLARY TO THE FRENCH CONNECTION CASE IN WHICH THE BAD GUYS WERE COPS. GENTILE SAYS THE EVIDENCE IS CIRCUMSTANTIAL AND THAT THE COPS SEEM THE MORE LIKELY CULPRITS, THAT DET. SCHOLL HAS SHOWN SIGNS OF DRUG USE, THAT THE OTHER CUSTOMERS WERE PRES-

SURED INTO COMPLAINING BY METRO, THAT THOSE CUSTOMERS ARE KNOWN DRUG DEALERS, AND THAT OTHER AGENCIES HAVE OPERATED OUT OF W. VAULT WITHOUT HAVING SIMILAR PROBLEMS.

2-5-88: METRO NEWS CONFERENCE IN WHICH CHIEF SULLIVAN EXPLAINS THAT THE OFFICERS INVOLVED HAVE BEEN CLEARED BY POLYGRAPH TESTS. STORY MENTIONS THAT THE POLYGRAPHER WAS RAY SLAUGHTER, UNUSUAL BECAUSE SLAUGHTER IS A PRIVATE EXAMINER, NOT A METRO EXAMINER. REPORTER DETAILS SLAUGHTER'S BACKGROUND, INCLUDING HIS TEST OF JOHN MORAN REGARDING SPILOTRO CONTRIBUTIONS. ALSO MENTIONS SLAUGHTERS' DRUG BUST, SPECULATES ABOUT WHETHER IT WAS A SETUP BY THE FBI. QUOTES GENTILE AS SAYING THE TWO CASES ARE DEFINITELY RELATED.

TELEVISION CHANNEL 3, PARTIAL TRANSCRIPTION OF NEWS BROADCAST REGARDING SANDERS CASE.

TONITE METRO POLICE ARE VIGOROUSLY CONTINUING THE INVESTIGATION INTO THE LOSS OF DRUGS AND TRAVELERS CHECKS USED IN AN UNDERCOVER OPERATION...

POLICE SAY THE DRUGS AND TRAVELERS CHECKS WERE STOLEN FROM A SAFE DEPOSIT BOX INSIDE WESTERN VAULT COMPANY ON MARYLAND PARKWAY.

AT LAST REPORT, METRO OFFICERS WERE STILL ON THE SCENE SERVING A SEARCH WARRANT...

OFFICERS ARE REPORTEDLY SEARCHING EVERY SAFE DEPOSIT BOX AT WESTERN VAULT THAT IS LISTED AS EMPTY ON COMPANY RECORDS... POLICE ARE ALSO SEARCHING EVERY BOX THAT ATTRACTS THE ATTENTION OF A NARCOTICS SNIFFING DOG...

POLICE BELIEVE THE DRUGS AND TRAVELERS CHECKS MIGHT HAVE BEEN STOLEN FROM THEIR SAFE DEPOSIT BOX AND PLACED INSIDE ANOTHER BOX AT WESTERN VAULT...

AN INTENSE POLICE INVESTIGATION INTO THE THEFT OF DRUGS AND TRAVELERS CHECKS FROM A SECRET SAFE DEPOSIT BOX CONTINUES TODAY.

MORE THAN A WEEK AGO POLICE REVEALED THAT THEY HAD BEEN RIPPED OFF.

ABOUT 9 POUNDS OF COCAINE AND 300-THOUSAND DOLLARS WORTH OF TRAVELERS CHECKS WERE TAKEN IN THE THEFT.

DAN BURNS IS IN THE NEWSROOM NOW WITH
THE LATEST DAN

[ILLEGIBLE] VERY ANGRY OVER THE [ILLEG-
IBLE] THEFT OF THE COCAINE AND TRAVELERS
CHECKS ... FROM SHERIFF JOHN MORAN ...
ON DOWN.

THAT EXPLAINS WHY POLICE ARE WORKING
SO HARD ON NABbing THE PERSON OR PEOPLE
RESPONSIBLE.

TIME 1:09

OUTCUE ... OF THE LOOT BEHIND.

(6)
No. 89-1836



IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DOMINIC P. GENTILE,
Petitioner

v.

STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Nevada Supreme Court

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment's speech and press clauses limit the power of a State to punish a lawyer for holding a press conference to respond to charges against his client, assert his client's innocence, and summarize the defense, when there is no record evidence that the conference could or did interfere with the impartial administration of justice?

2. Whether, and if so under what circumstances, speech about public officials' behavior on an issue of public concern may be forbidden because the speaker is counsel in pending litigation involving those officials and issues?

3. Whether a state Supreme Court Rule forbidding lawyer extrajudicial statements having a "substantial likelihood of materially prejudicing an adjudicative proceeding," and decreeing that publicly expressing "any opinion as to the guilt or innocence of a defendant" or the "credibility of a . . . witness" is "ordinarily . . . likely" to have such an effect, while permitting comment "without elaboration" on "the general nature of the . . . defense," is impermissibly vague and overbroad under the First Amendment and the Due Process Clause?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1836

DOMINIC P. GENTILE,
v. *Petitioner*
STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Nevada Supreme Court

BRIEF OF PETITIONER

OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The opinion of the Nevada Supreme Court is reported as *Gentile v. State Bar of Nevada*, 106 Nev. 60, 787 P.2d 386 (1990). The judgment of the Southern Nevada Disciplinary Board, (JA 2) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Nevada Supreme Court was entered and filed on February 21, 1990. This Court has jurisdiction under 28 U.S.C. § 1257 (1988), because petitioner raised and preserved, and the highest court of the state specifically rejected, a constitutional claim.

CONSTITUTIONAL AND RULE PROVISIONS AT ISSUE

The text of the Constitutional and rule provisions at issue are set out in the appendix to the petition for certiorari.

STATEMENT OF THE CASE

Dominic Gentile is a Nevada attorney with an unblemished national reputation as advocate, teacher, author, and bar leader. Mr. Gentile represented Grady Sanders in a highly publicized criminal case involving the disappearance from a safety deposit box at his company's storage facility of large amounts of cocaine and traveler's checks used by the Las Vegas police as part of an undercover operation. Mr. Gentile was disciplined by the State Bar for making statements to the press which were nonetheless found to have no prejudicial effect on trial fairness. These limited press statements were made well in advance of trial in response to a barrage of police and prosecution-initiated publicity adverse to the defendant.

PUBLICITY BEFORE THE SANDERS' INDICTMENT

The disappearance was an event of some moment in the Las Vegas community and it spawned intense media coverage of the investigation, indictment, and trial of Sanders. Throughout the year-long investigation, the State focused attention on Sanders, diverted suspicion from two undercover police officers who had direct access to the safety deposit box, and forcefully proclaimed their innocence.

On Saturday, January 31, 1987, undercover officers affiliated with the Intelligence Bureau of the Las Vegas Metropolitan Police Department (Metro Police), discovered the theft of nearly \$300,000 in American Express traveler's checks and a large amount of cocaine from a safety deposit box at the Western Vault Corporation in Las Vegas.¹ (Sun, Feb. 3, 1987, JA 108.²)

¹ The checks and drugs were maintained in a lock box rented by police in their undercover roles who used it as a "flash roll" to demonstrate the agent's ability to engage in illegal transactions.

² Reference to newspaper and television broadcasts are cited with the name of the paper, the Las Vegas Sun (hereinafter "Sun") and the Las Vegas Review-Journal (hereinafter "R-J") or tele-

Several days after the discovery, John Moran, the popular and widely-respected sheriff of Las Vegas, held a press conference at which he identified Metro Police as the victim of the theft, announced a major investigation, and named both police and employees of Western Vault as possible suspects. (R-J, Feb. 2, 1987, JA 84-86; Sun, Feb. 3, 1987, JA 108-09). Sheriff Moran expressed his continuing personal confidence in the Intelligence Bureau which was described in early media coverage as an elite corps of detectives that had gained a nationwide reputation for its success in undercover operations. (*Id.*) He indicated that no officers had been disciplined and that he had "faith and trust" in them. (R-J, Feb. 2, 1987, JA 85.)

Over the next several days the press repeated that although possible suspects of the theft included both police and employees of the vault company, Sheriff Moran's confidence in the Intelligence Bureau remained high. (R-J, Feb. 4, 1987, JA 87.) The Metro Police disclosure that nine pounds of cocaine was missing included a statement that two undercover detectives with access to the safety deposit box had voluntarily submitted to a drug test with negative results. (R-J, Feb. 5, 1987, JA 88-89.)

The media reported a major turn in the investigation approximately a week later when the two officers were "cleared" of any wrongdoing and the investigation shifted toward vault company employees. Narcotic-sniffing dogs were brought in to search all of the boxes listed as empty on the company's records. The focus on the vault company came at the same time the Metro Chief of Detectives reaffirmed earlier reports that the two undercover officers had not been involved in the crime. (Sun, Feb. 1, 1987, JA 110-11.)

vision channel, the date of publication or transmission, and the Joint Appendix page number wherein the report is contained. The Joint Appendix contains excerpts of a synopsis of media coverage submitted by Mr. Gentile as Respondent's Exhibit A at the hearing below. Articles not included in the Joint Appendix are contained in the Exhibit and are cited by page number.

In early March of 1987 the focus on vault company employees narrowed to Mr. Sanders who was described as unwilling to cooperate in the investigation. (Channel 8 News Summary, March 10, 1987, JA 130.) It was alleged that he had previously drilled open customer's boxes without permission, found drugs in those boxes and failed to report this to the authorities. (R-J, March 12, 1987, JA 90-91.) At the same time, police sources were quoted as pursuing the theory that the theft was designed to discredit an ongoing undercover operation, and that Mr. Sanders was linked to targets of the operation. The operation was described as a major assault on organized crime. (*Id.*)

Mr. Sanders, who initially declined comment, stated to one TV station that the police were trying to shift blame away from themselves and complained of the Metro Police running a sting operation at his company's facility without his permission. (Channel 8 News Summary, March 10, 1987, JA 130-31.)

At the same time that the press was reporting the allegations that Mr. Sanders was not cooperative, Deputy Police Chief John Sullivan again stated publicly that the two officers had been cleared as possible suspects. He emphasized this by noting that both had voluntarily taken and passed polygraph examinations while Western Vault had declined to have its employees so tested.³ (Sun, March 11, 1987, JA 112-13.)

In late March of 1987, Western Vault announced that it would close in order to prevent further breaches of client confidentiality caused by the government's sting operation and subsequent investigation. (Sun, March 26,

³ Mr. Gentile believed that the prosecutors in the case were present when the police announced that the two undercover officers had passed polygraph exams. (JA 40, 55.) The press reported that the prosecutor who ultimately tried the case, Mr. Teuton, headed the year-long investigation. (R-J, Feb. 6, 1988, JA 100-01.) In any event, he viewed the prosecutor as responsible for the actions of his investigative agents. *Accord* Model Rules of Professional Conduct Rule 3.8(e) (1983).

1987, JA 114; R-J, March 26, 1987, JA 92-93.) Mr. Sanders again did not comment on the press stories. (*Id.*; Channel 3 News Summary, June 1, 1987, JA 130-31.) The press accounts of the plan to close Western Vault recounted earlier events and again repeated that the two undercover police officers had been cleared of any potential wrongdoing. (R-J, March 26, 1987, JA 93.) The Metro Police commander stated that Mr. Sanders had refused to cooperate, refused to take a polygraph test, and had failed to answer questions to the Metro Police Department's satisfaction. He concluded that the vault theft was an inside job. (*Id.*; Channel 8 News Summary, June 1, 1987, JA 130-131.)

Media attention was rekindled in the spring of 1987 when two Las Vegas newspaper commentators began a series of articles dealing with the prosecution of a well-known Las Vegas polygraph examiner, Ray Slaughter, who had administered the polygraph examinations to the two undercover officers responsible for the burglarized Metro lock box, Officers Schaub and Scholl. Slaughter was arrested in a cocaine sting involving an attractive undercover female informant. The articles disclosed that the FBI had information that Slaughter had stated that he had tested two undercover agents who had lied, and that his defense was that he had been set-up by the FBI in order to pressure him to testify against the two police officers. Initial accounts of the Slaughter case identified the two officers as "two of the most daring and respected cops on the force." (R-J, March 31, 1987, JA 94.) The accounts also raised allegations that cash and contraband had been removed from other safety deposit boxes and placed into boxes maintained in the vault company's name. (*Id.*, JA 94-97; Sun, Jan. 7, 1988, JA 115-16.)

In a July 21, 1987 press report, police sources were quoted as once again reporting that the two undercover police officers had been cleared of any wrongdoing. A police captain, however, would not comment on whether Mr. Sanders would be criminally charged. (R-J, July 21,

1987, JA 98.) In the fall of 1987, leaks began to appear from the grand jury indicating that it was taking testimony in the Western Vault case and that the focus of its probe was on Western Vault employees. (Channel 8 News Summary, Oct. 8, 1987, JA 131.) The press reported that "investigators" believed that Western Vault allowed the unauthorized opening of boxes including Metro's box and that other victims were expected to testify before the grand jury. (*Id.*) The grand jury leaks continued through January of 1988 when press accounts indicated that an indictment was near and that Mr. Sanders was the key target. (Sun, Jan. 28, 1988, JA 121-23.)

SANDERS' INDICTMENT AND THE DEFENSE PRESS CONFERENCE

Mr. Sanders was eventually indicted and he was arraigned on February 5, 1988 on charges of larceny, racketeering and narcotics trafficking. The indictment included not only the theft of \$1.3 million of narcotics and traveler's checks from the Metro safety deposit box but, in addition, a series of alleged thefts of more than \$2 million from seven safety deposit boxes rented by other customers. (R-J, Feb. 6, 1988, J.A. 100-03; Sun, Feb. 6, 1988, JA 127-29.)

Dominic Gentile was retained by Grady Sanders several months prior to his indictment. (TR 57, JA 38).⁴ Mr. Gentile brought to the Sanders defense a wealth of experience as a criminal law practitioner and an in-depth knowledge of the Las Vegas community and judicial system. During his 17 years of practice, Mr. Gentile has gained a national reputation as a criminal defense lawyer and bar leader.⁵ (TR 53-56, JA 36-38.)

⁴ Reference to the transcript of the hearing held by the State Bar of Nevada, Southern Nevada Disciplinary Board on April 17, 1989 are also cited as TR —. The entire transcript is reprinted in the Joint Appendix at JA 6-82.

⁵ Mr. Gentile served for six years on the Board of Directors of the National Association of Criminal Defense Lawyers, was Asso-

Because of the "tremendous imbalance" that Mr. Gentile perceived had been created by the State's improper publicity tactics, he pondered how he might redress this injustice.⁶ The night before the arraignment, Mr. Gentile met with two other attorneys to consider the ethical limits of what he could say to the press about the Sanders case. (TR 65-66, JA 42-43.) Mr. Gentile was aware of general limitations on pretrial publicity but was unclear as to the exact application of Nevada Supreme Court Rule 177 (1976) (hereinafter "Rule 177") in particularized factual situations. (TR 66, JA 43.) Working through the evening, the attorneys focused their attention on Rule 177 and the general First Amendment limits on the State's ability to regulate attorney speech.⁷ (TR 66, JA 43.) Mr. Gentile reached several conclusions that evening. The first was that the time be-

ciate Dean of the National College for Criminal Defense at the University of Houston's Bates College of Law, was chair of the RICO Case Committee of the ABA's Criminal Justice Section, published books and articles on criminal law topics, and was active in the ABA, Illinois, and Nevada Bars. (TR 54-57, JA 36-38.)

⁶ At the time of the indictment, Mr. Gentile's principal concern was the adverse impact on potential jurors of the state's disclosures that the two police officers had passed polygraphs and had been formally cleared. This prejudice was compounded by the announcement that Sanders had refused to take a police polygraph exam. He was aware that press accounts consistently mentioned that the polygraph cleared the police suspects and was concerned because polygraph exam results can not be brought before the jury under Nevada law. (TR 61-62, JA 41.)

In planning his defense strategy, Mr. Gentile was also aware of the adverse effect of the pre-indictment publicity on his client. Mr. Sanders believed that he suffered millions of dollars in injuries as a result of the adverse publicity. (Las Vegas Sun, August 27, 1988, P1B., Resp. Ex. A.) He was forced to close Western Vault Company and lost a ground lease on a New Jersey casino due to his inability to obtain a gaming license as a result of the indictment in this case. (TR 62-64, JA 41-42.)

⁷ The complete text of some of the materials consulted by the attorneys as well as handwritten research notes were contained as Respondent's Exhibit D at the hearing in this matter and are in the record.

tween any pretrial statement and the trial itself was an important determinant of the potential for prejudice. He concluded that the rule and applicable case law did, however, place limits on what he could say. He concluded that the state had poisoned the prospective juror venire and that his professional obligations required that he respond. (TR 89, JA 56.) Finally, Mr. Gentile was aware of the real limitations on his client's ability to defend himself in the press. He was concerned about waiver of privilege and his client's inability effectively to articulate his position. As a result, he instructed his client not to talk to the press and believed that he had an obligation to speak for him. (TR 71-73, JA 46-47.)

The next morning at the arraignment, Mr. Gentile declined to speak with the press at the courthouse, but rather convened an impromptu press conference at his office. While he had previously been involved in high-profile cases and had dealings with media representatives, he had never before held a press conference, and considered this a highly unusual step. (TR 64-65, JA 42.) Following arraignment, he knew that the trial would be at least six months in the future, August 8, 1988. (TR 67-68, JA 44.) At the press conference, he attempted to steer a course between the limitations that his research indicated Rule 177 imposed on his right to comment and his professional obligation vigorously to represent the interest of his client.⁶ He began the conference with a brief statement emphasizing his client's innocence, and describing in summary fashion the defense theory that the persons in the best position to have stolen the drugs and money were the police officers, specifically, Detective Scholl. (Cert. App. 8a-9a.) His comments were carefully tailored to express only what trial evidence would prove and to steer clear of any potentially inadmissible evidence.

⁶ A transcript of the press conference was reprinted in the appendix to the petition for certiorari, citations to the transcript will be listed as Cert. App. —.

In his initial comments, Mr. Gentile addressed the portions of the indictment dealing with other individuals who claimed loss of property at Western Vault Corp. He stated that four of the alleged victims were known drug dealers and convicted money launderers. He noted that three of them had only come forward after they were already in trouble on other charges and trying to work themselves out of their predicament. (*Id.*)

Following this brief presentation, Mr. Gentile took questions from the floor. In several instances he refused to answer questions because his view of his ethical obligations prohibited a response. (Cert. App. 9a-13a.) He disclosed that he had investigated Detective Scholl but refused to discuss the results. He also refused to discuss the FBI investigation. (Cert. App. 10a.) He referred several times to Mr. Sanders as a scapegoat.⁹

When asked by reporters to elaborate on the credibility of the victim witnesses, including giving details on their background, Mr. Gentile refused to respond, again citing his ethical responsibilities. He specifically referred to his review of the literature the evening before and said that he could not name which specific individuals had a drug background. (Cert. App. 11a.) When asked about the polygraph examination of the police officers, Mr. Gentile again refused to comment but did state that his client had not taken a police polygraph. Finally, Mr. Gentile strongly implied that Detective Scholl had used cocaine in an earlier undercover operation. (Cert. App. 14a.)

Mr. Gentile's press conference was reported on one television station and in the two Las Vegas newspapers.

⁹ Mr. Gentile was also critical of Metro's failure to alert Western Vault to the ongoing undercover operation being conducted in its facilities, stating that other law enforcement agencies had previously conducted such activities and had always disclosed them to management. He spoke about the risk to innocent parties in undercover sting operations and specifically referenced risks associated with undercover agents flashing drugs and large amounts of money at the Western Vault facility. (Cert. App. 10a-11a.)

(Channel 8 News Summary, Feb. 5, 1988, JA 131-132; Sun, Feb. 6, 1988, JA 127-129; R-J, Feb. 6, 1988, JA 100-03.) The television report included coverage of a Metro Police news conference at which Chief Sullivan restated that the officers in question had been cleared by a polygraph examiner. (Channel 8 News Summary, Feb. 5, 1988, JA 132.) In press accounts, the Sanders prosecutor, Mr. Teuton, responded to Mr. Gentile's statement by arguing that the indictment was legitimate, and that he had to have proof beyond a reasonable doubt of defendant's guilt before bringing charges. (Sun, Feb. 6, 1988, JA 128-29.) The press also quoted Chief Sullivan's statement from his press conference that the two detectives had nothing to do with the alleged crimes. (*Id.*, JA 129.)

The trial began on August 10, 1988, and was preceded by a careful voir dire conducted by the trial judge. (TR 74, JA 48.) He inquired of juror exposure to pretrial publicity and was able to impanel a jury free of any media taint. (Resp. Ex. B and C, transcript of voir dire.) During his opening statement, throughout the presentation of the evidence, and in closing argument, Mr. Gentile reiterated the same defense that he had referred to in summary fashion during the press conference. He brought out the credibility problems of the alleged victims, and Detective Scholl's prior drug use, and his position as the most likely person to have stolen the traveler's checks and drugs. (TR 73, 108-109, JA 47, 67.) At the conclusion of the trial, Mr. Sanders was acquitted on all counts. (Sun, August 27, 1988, JA 47; Resp. Ex. A).

In a March 8, 1988 letter to the Executive Director of the Nevada Bar, Chief Justice Young of the Nevada Supreme Court complained of Mr. Gentile's press conference and attached newspaper accounts of the conference. (JA 83.) On December 6, 1988, an ethics complaint was filed alleging a violation of Rule 177 by Mr. Gentile in the conduct of the press conference. Mr. Gentile answered the complaint and a hearing was held before the Southern Nevada Disciplinary Board.

At the hearing, bar counsel relied exclusively upon the following evidence: a videotape of the press conference, the complaint, and two letters authored by Mr. Gentile. (TR 1-18, JA 1-16.) Mr. Gentile, through counsel, presented a lengthy defense. An extensive compendium of newspaper articles dealing with the Sanders case and transcripts of television coverage were submitted. (Resp. Ex. A.) The transcripts of *Sanders'* jury voir dire and press conference videotape were submitted. The defense presented witnesses who were knowledgeable in both the criminal justice process in Nevada and the media's relationship with the court and law enforcement agencies.

The defense witnesses included: the President and Associate Editor of the Sun, a former criminal defense lawyer (TR 21-51, JA 18-34); another former criminal defense lawyer currently serving as in house counsel to a Las Vegas television station (TR 99-111, JA 62-68); a former prosecutor (TR 111-122, JA 68-74); and the Federal Defender for Las Vegas (TR 122-126, JA 75-77). The media witnesses testified to a pronounced imbalance in reporting on criminal cases with reporters having much greater access to police and prosecutors than the defense. (TR 26, 43, 104-09, JA 20, 30, 65-67.) The imbalance was attributed to defense reluctance to comment, persistent public interest in criminal coverage, and a nationwide trend for law enforcement officials to emphasize their good works and effectiveness in order to further their institutional interests. (TR 26, JA 20-21.)

The four witnesses reviewed the press and voir dire exhibits and concluded that Mr. Gentile's comments were necessary and appropriate, and had not caused any trial prejudice. (TR 35, 108, 115-16, 124, JA 25-26, 67, 71, 75-76.) One witness referred to her knowledge of studies demonstrating that television viewers quickly forget comments made on only one occasion (TR 107, JA 66), and that several repetitions are necessary for retention. Several of the witnesses expressed their confusion over the lack of clarity in Rule 177. (TR 115-17, 121, JA 71, 74.)

Mr. Gentile testified in his own defense and reviewed at length the events that led up to the press conference, including his uncertainty regarding the language of Rule 177 (TR 93, JA 58.) He stated that in his view, the allowance of comment on the nature of the defense in Rule 177(3)(a) could not be reconciled with Rule 177(2)'s prohibitions on statements about witness credibility or client innocence. (TR 94, JA 59.) He reiterated his belief that the length of time prior to trial was the principal determinant of likely prejudice, alluding to the cases he had read, including one from this Court, indicating that two months before trial was a sufficient time to mitigate any damage that statements to the press might cause. (TR 95, JA 59.)

The subsequent factual findings and conclusions of law authored by the Southern Nevada Disciplinary Board isolate six separate statements made by Mr. Gentile during the press conference, and conclude that these comments, reprinted in the margins,¹⁰ had a substantial

¹⁰ These statements by Mr. Gentile were:

(i) "... the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being levelled against him, but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Traveller's checks, is Detective Steve Scholl."

(ii) "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Traveller's checks than any other living human being."

(iii) "Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something."

(iv) "Now, up until the moment, of course, that [the other victims] started going along with what detectives from Metro wanted them to say, these people were being held out as being

likelihood of materially prejudicing the *Sanders* trial in two respects: (i) they related to the character, credibility reputation and criminal record of witnesses in the *Sanders* trial (a violation of Rule 177(2)(a)); and, (ii) they contained an opinion as to the guilt or innocence of Mr. Sanders (a violation of Rule 177(2)(d)).

Mr. Gentile appealed this recommendation to the Nevada Supreme Court, waiving the confidentiality of his discipline. The Nevada Supreme Court affirmed all findings of the Disciplinary Board, including that Mr. Gentile knew, or reasonably should have known, that his comments had a substantial likelihood of creating trial prejudice. The court found no actual prejudice but based its ruling on the substantial likelihood of material prejudice. Finally the court rejected without discussion the constitutional challenges presented here as without merit.¹¹

SUMMARY OF THE ARGUMENT

In order to resolve the potential tension between the First Amendment rights of attorneys and the Sixth Amendment rights of the State, this Court need not assign priority as between these constitutional protections, but can accommodate both by requiring actual prejudice or a substantial and imminent threat to a fair trial as a pre-condition to the suppression of otherwise protected speech.

Attorney speech on pending litigation is an invaluable source of knowledge, criticism, and evaluation of a vital component of the government. The importance and preva-

incredible and liars by the very same people who are going to say now that you can believe them."

(v) "I think Grady Sanders was indicted because he—he was a scapegoat the day they opened the [safe-deposit] box."

(vi) "We've got some video tapes that if you take a look at them, I'll tell you what, he [Detective Scholl] either had a hell of a cold or he should have seen a better doctor."

¹¹ Both the Board (JA 5) and the Nevada Supreme Court (Cert. App. 4a), summarily rejected petitioner's constitutional challenges to Rule 177.

lence of such speech in the early days of the republic illuminates the historic purpose of the First Amendment.

In a series of cases, this Court has applied the clear and present danger test to commentary by observers of, and participants in, the justice system. This Court developed certain "working principles" about such speech. These include: (1) broad gauge speech bans, whether legislative, regulatory, or judicial, are constitutionally suspect; (2) punishment or suppression of narrow categories of speech must rest on a proven, clear, and imminent danger of identified harm; and (3) before prohibition or punishment is justified, less restrictive alternatives must be shown to be unavailable or unavailing.

These working principles have been applied uniformly to protect the speech of participants in the justice system and should apply with equal force to the attorney comments at issue here. Rule 177 violates these working principles. It does not incorporate the clear and present danger standard, and categorically limits speech based upon a tendencies test. The Rule's categorical proscription on speech also fails to account for the availability of less restrictive means to eliminate the potential for prejudice.

There is no legal or policy justification for granting lawyers inferior First Amendment status as speakers. Rather, the State should shoulder the burden of proof to justify any special departure for lawyer speech from the standards applied to other commentators on the justice system. Suppression of lawyer speech not only violates the First Amendment rights of the lawyer, but also the rights of the client and the public. Finally, Rule 177 is unconstitutionally vague and carries with it the potential for discriminatory enforcement. Its failure to give adequate notice additionally creates the risk of overbroad application to otherwise protected speech.

ARGUMENT

I. THE NEVADA SUPREME COURT'S RULE UNCONSTITUTIONALLY ABRIDGES THE FREEDOM OF ATTORNEYS TO COMMENT ON PENDING LITIGATION.

In the past, this Court has refused to "assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976). We do not today ask the Court to make that difficult choice. Rather we ask the Court to apply the clear and present danger doctrine to the speech at issue here: the same vehicle this Court has utilized in the past to *avoid* such conflicts in cases where the competing constitutional interests were substantial, including alleged threats to the administration of justice. Indeed, when the Court has focused on Sixth Amendment fair trial rights standing alone, it has strictly applied an actual prejudice test, refusing to remedy potential, yet unrealized, prejudice to fair trial interests.¹² We suggest that, rather than elevating the State's Sixth Amendment fair trial interests over the First Amendment rights at issue here, the Court should accommodate both interests by requiring actual prejudice or a substantial and imminent threat to fair trial as a precondition to the suppression or sanction of otherwise protected speech.

¹² See *Smith v. Phillips*, 455 U.S. 209, 216 (1982) (absent proof of actual juror bias, no Sixth Amendment violation from juror's having job application pending with prosecutor's office); *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (Sixth Amendment right to effective assistance of counsel violated only where actual prejudice is demonstrated); *United States v. Morrison*, 449 U.S. 361, 365 (1981) (no Sixth Amendment violation based on government misconduct absent actual prejudice). See also *United States v. Bagley*, 473 U.S. 667 (1985) (government's failure to produce exculpatory evidence a due process violation only if it affected outcome).

A. Petitioner's Speech Is Protected by the First Amendment.

The speech involved in this case—speech of an attorney about pending litigation—must be viewed in the broader context of the public's persistent and legitimate interest in the conduct of its business in the nation's courts. When considered alongside the history and jurisprudence of the First Amendment, petitioner's speech falls squarely within the area sheltered from government prohibition and punishment.

1. *The History of the First Amendment Demonstrates that Petitioner's Speech is Core Speech.*

The Framers of the Bill of Rights rejected the British system of press restraint, and our early history as a nation reinforced that view. We invoke that history by referring to this Court's exposition of it in *Bridges v. California*, 314 U.S. 252, 263-68 (1941).

The years since 1941 have added to our knowledge of the First Amendment's historical underpinning. The lawyer has been for all our history a public citizen, with as much a right and duty to speak out against injustice as to represent its victims in particular cases. And lawyer and litigant do not, by virtue of their status, forfeit their rights to comment and to truthful speech.

Leonard Levy, in *The Legacy of Suppression* (1960) [Levy I], criticized the view of history taken in *Bridges* and other cases. In his second edition, retitled more neutrally (and accurately) *Emergence of a Free Press* (1985) [Levy II], Professor Levy revisited the sources and conformed his view of the purpose of the First Amendment more closely to that relied on by this Court in *Bridges*. Levy II, at ix-xix.

We would not say that examination of admittedly incomplete historical records can wash away the First Amendment teaching of this Court's cases. But we do contend that the Court was right in *Bridges* about the central lesson to be drawn from the colonial and post-Revolutionary experience.

When James Otis litigated about the writs of assistance, he was not shy about speaking in public of the injustices he saw in those cases. See J. Quincy, *Report of Cases Argued and Adjudged in the Supreme Courts of Judicature of the Province of Massachusetts Bay* 51-57, 469-82 (1865); see also 2 *Legal Papers of John Adams* 106-47 (L. Wroth & H. Zobel eds. 1965). When John Adams was retained to represent John Hancock in a forfeiture proceeding, his contentions and later a text of his undelivered argument were thoroughly aired in the press of the time, along with running commentaries on the legal issues. *Id.* at 173-210. These court cases were "the Commencement of the Controversy, between Great Britain and America," according to an Adams letter of July 3, 1776. *Id.* at 107 n.2.

While the records available do not always identify the authors of contentious comments on pending cases, the concepts and vocabulary point clearly to lawyers as the source. The *Zenger* case of 1735, that most famous colonial seditious libel prosecution, put the wrong man in the dock. Zenger did not write the material for which he was prosecuted. The strident attacks on the administration of New York Governor Cosby, including pointed references to his manipulation of the judicial process, were written by lawyers.¹³

Although Eleazer Oswald was a printer and perennial litigant and not a lawyer, his pointed and even gleeful attacks on the administration of justice in Pennsylvania are well-documented. See, e.g., Teeter, *The Printer and the Chief Justice: Seditious Libel in 1782-83*, 45 *Journalism Q.* 232 (1968); Teeter, *Press Freedom and the Public Printing: Pennsylvania, 1775-83*, 45 *Journalism Q.* 539-44 (1968). See also Levy II 370. Oswald not only mocked Chief Justice McKean, but published "A Hint to Grand Juries" on the eve of that body's consid-

¹³ One of the authors was a former judge, Lewis Morris. See L. Powe, *The Fourth Estate and the Constitution: Freedom of the Press in America* 8 (1991); Levy II 37-45.

eration of politically-motivated charges against him. Oswald also warned "every lawyer" not to appear in court against a printer, lest:

"His name should, like his carcass, rot
In sickness spurn'd, in death, forgot."

Teeter, *supra*, p. 17, at 240.

Levy II contains dozens of examples, though mostly more polite, of contentious, robust, and wide-open debate by lawyers about the justice system. See generally Levy II 173-219. The colonial and post-Revolutionary history tells us more than that the press clause has independent significance, although it surely tells us that. See Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455 (1983). The criminal process, and related types of actions such as forfeitures, were essential means of social control by an increasingly unpopular and beleaguered British colonial authority. The press response to these judicial proceedings was a tocsin to the polity. Colonial and post-Revolutionary history establishes the tradition of lawyer comment on pending litigation.

Colonial courts attempted to suppress criticism directed at courts and their proceedings, as had been the practice in England. The "bad tendency" test, as reflected in Rule 177, is derived from these repudiated efforts to limit speech and is indeed of illegitimate lineage. It was part of the English offense of seditious libel. See G. Stone, "Sedition" 4 *Encyclopedia of Crime & Justice* 1425 (S. Kadish ed. 1983). Professor Stone aptly summarizes the law:

The trial was structured so as to leave most of the critical decisions in the hands of government officials. In prosecutions for seditious libel, the common-law jury was permitted to decide only whether the defendant had actually published the words in question. The judges reserved to themselves the central issues of malicious intent and bad tendency. Although the intent and tendency concepts had the potential to limit significantly the doctrine of seditious libel, in the hands of judges they were of no appreciable con-

sequence. The judges simply inferred bad intent and bad tendency from the very fact of the libel. In practical effect, then, the criticism itself became criminal. And, of course, truth was no defense.

Id. at 1426.

The fate of seditious libel in the colonies is well-known. After the *Zenger* case, the British and their surrogates did not dare attack colonial printers in this way. See Anderson, *supra* p. 18, at 510. Even in England, attempts to enforce the libel laws met with repeated rebuke. See Tigar, *Crime Talk, Rights Talk and Double-Talk: Thought on Reading Encyclopedia of Crime and Justice*, 65 Tex. L. Rev. 101, 113-27 (1986).

The epitaph of seditious libel was written by the First Amendment. Madison thought, in his 1789 Report on the Virginia Resolutions, it had been written long before:

In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . .

Quoted in Anderson, *supra* p. 18, at 510 n.307.

The presumption of bad tendency, without proof of actual or prospective harm, and the elimination of any requirement that the speaker intended harm, are hallmarks of the procedure employed in this case by the Nevada authorities. The Rule is in conflict with the historic recognition of the importance of open comment on the affairs of justice, and the resulting body of law both tolerant of speech and protective of the fair administration of justice.

2. This Court's Precedent Establishes the Clear and Present Danger Standard as the Appropriate Test Governing Regulation of Speech About Pending Litigation.

This Court has uniformly upheld the First Amendment rights of interested persons and participants to re-

port and comment on the people's business in our system of justice and has consistently turned aside government efforts to ban or punish speech about pending litigation. In so doing, this Court has confronted one specter after another of perceived evils raised to justify banning speech on matters of such public importance, but none has withstood the searching scrutiny the First Amendment compels.

In *Bridges*, for example, the Court invalidated the contempt convictions of a newspaper publisher, the Times-Mirror, and a union official for their speech critical of judicial handling of pending litigation about labor strife. Initially, the Court rejected the contention that our law of speech was premised upon British common law. 314 U.S. at 263-64. To accept this argument, according to the Court, would be to "deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and the press.'" *Id.* at 264 (quoting Scholfield, *Freedom of the Press in the United States*, 9 Publications Amer. Sociol. Soc. 67, 76).

Having dispatched the contention that the First Amendment is inapplicable to speech about pending litigation, the *Bridges* opinion applied prevailing First Amendment analysis, the clear and present danger standard, to the challenged speech. According to the Court, "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." 314 U.S. at 263. Application of this "working principle," necessarily precludes the use of either an "inherent tendency" or a "reasonable tendency" test to judge whether speech presents a threat to the administration of justice. *Id.* at 273. The Court declined to "start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials," and instead, examined the "particular utterances" to determine whether they posed an ex-

tremely serious and imminent danger. *Id.* at 271. The challenged speech, including Bridges' threat of a broad labor strike unless the court granted a new trial motion, was found wanting under the clear and present danger standard.

In 1946, this Court reaffirmed the "working principle" of *Bridges* in *Pennekamp v. Florida*, 328 U.S. 331 (1946). Justice Reed, writing for the Court, acknowledged that the clear and present danger test had the "vice of uncertainty" but saw guidance emerging from its repeated application by the courts. *Id.* at 334. Significantly, the *Pennekamp* opinion held that the Court could not defer to the state court's conclusion of harm, but rather it "was compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts." 328 U.S. at 335.¹⁴

At issue in *Pennekamp* were vituperative and inaccurate newspaper editorials that generally accused Florida judges of coddling criminals. The Court held that "Freedom of expression should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice," *id.* at 347, and concluded that the publications in issue did not pose a clear and present danger to the administration of justice.

Only a year later, in 1947, this Court returned to "the principles announced" in *Bridges* and *Pennekamp* in *Craig v. Harney*, 331 U.S. 367, 368 (1947), and overturned contempt convictions of a newspaper publisher and newspaper staff based upon their unflattering description of a trial judge's handling of a pending civil case and their support for the granting of a new trial motion. The *Craig*

¹⁴ This holding would foreshadow the independent examination rule of the later cases. *E.g.*, *Rose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964).

opinion noted that this Court had previously rejected a "reasonable tendency" test, and had chosen instead in *Bridges* and *Pennekamp* to weigh threats to fair trials under the more stringent clear and present danger standard. *Id.* at 372-73.¹⁵ And even though the lower state court in *Craig* had purported to apply the clear and present danger test, this Court was compelled to make "an independent examination of the facts." *Id.* at 373. Though the articles were unfair criticism, this Court concluded they did not immediately imperil the administration of justice. *Id.* at 376-78.¹⁶

In 1962, this Court again confronted a contempt conviction for speech about pending litigation in *Wood v. Georgia*, 370 U.S. 375 (1962). In *Wood*, a trial court summoned the press to hear its instructions to a sitting grand jury about the need to investigate "Negro block voting" during a local political campaign. The county sheriff took exception and issued a press release complaining that the court's action constituted race agitation and then submitted an open letter to the grand jury implying that the court's instructions were false and suggesting that they should instead investigate the local Democratic party organization. *Id.* at 379-80. Relying on the clear and present danger "working principle" fashioned in *Bridges*, *Pennekamp*, and *Craig*, this Court reversed the sheriff's contempt conviction. *Id.* at 384-85.

In *Wood*, this Court held again that it was obligated to conduct an independent examination of the seriousness of the alleged threat. The *Wood* opinion faulted the lower court's conclusory findings and its failure to "indicate in

¹⁵ Even Justice Frankfurter, writing in dissent, did not quarrel with the application of the clear and present danger test; he simply would have upheld the judgment of the Texas courts that the challenged speech posed such a danger to pending litigation. *Craig*, 331 U.S. at 391.

¹⁶ In addition, the *Craig* opinion rejected the claim that, because the comment concerned a civil trial involving private disputes, the First Amendment offered any less protection than it did in criminal cases where there is a public concern. 331 U.S. at 378.

any manner *how* the publications interfered with the grand jury's investigation." *Id.* at 387 (emphasis in original). Moreover, the Court observed that the prosecution had called no witness "to show that the functioning of the jury was in any way disturbed" nor was there a showing "that the members of the grand jury, upon reading the petitioner's comments in the newspapers, felt unable or unwilling to complete their assigned task." *Id.* Consistent with the "working principle" announced in *Bridges*, the *Wood* opinion declined to accept conjecture about alleged dangers to the administration of justice in lieu of proof.¹⁷

The *Wood* opinion also acknowledged that "The administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the active cooperation of an enlightened public." *Id.* at 391. Echoing Justice Black's opinion in *Bridges*, the *Wood* opinion found that it is because such speech touches upon matters of great public importance that it deserves constitutional protection, as the "type of danger evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification." *Id.* at 388; cf. *Bridges*, 314 U.S. at 268. Finally, the *Wood* opinion rejected the argument that the sheriff, as an officer of the court, was not entitled to the full First Amendment protections of the average citizen. 370 U.S. at 393.¹⁸

¹⁷ Once again, the dissent in *Wood*, like Justice Frankfurter in the *Craig* case, did not dispute the applicability of the clear and present danger test, but rather agreed with the lower court's conclusion that it had been satisfied as to the sheriff.

¹⁸ This consistent course of decision was reaffirmed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where the Court held that the right to report on events in the justice system must prevail even over a legislative assertion of a rape victim's right to privacy. Again, this Court focused on the important role of public scrutiny in monitoring the administration of justice, finding that press attention "serves to guarantee the fairness of trials." 420 U.S. at 492.

The final case in the evolution of the "working principle" begun in *Bridges* occurred in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). In *Landmark*, a Virginia newspaper was found guilty of violating a Virginia statute for disclosing the name of a judge that had been the subject of an ethics proceeding. Chief Justice Burger, writing for the Court, reversed the conviction.

Guided by *Bridges* and its progeny, the *Landmark* opinion employed the clear and present danger test, albeit not in the "mechanical" way that the Virginia Supreme Court had done below. While agreeing that the test was not "a technical legal doctrine" the *Landmark* opinion gave it content as follows:

Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed.

Id. at 842-43.

The *Landmark* opinion rejected the contention that the Virginia legislature could, in the abstract and without "hard in-court evidence," make a conclusive finding that a category of speech posed a clear and present danger. *Id.* at 833 (quoting *Landmark*, 217 Va. 699, 712 (1977)). According to this Court, "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." 435 U.S. at 843 (citing *Pennekamp*).¹⁹ Accordingly, no presumption of harm could attach as a result of the legislature's prior conclusions about likely harm. According to *Landmark*, fidelity to the

¹⁹ Significantly, the *Landmark* opinion applied this demanding standard even though all parties, and the court below, had concluded that the criminal proceedings did not constitute a prior restraint, but rather were an after-the-fact sanction imposed upon speech.

"working principle" emerging from the consistent line of precedent since *Bridges* demanded a proof of extremely serious and imminent harm not present in the record before it. 435 U.S. at 845.²⁰

3. *Broad Gauge, General Prohibitions on Speech Enforced by a Reasonable Tendencies Test Violate the First Amendment.*

The Court's opinion in *Landmark* is more than a result and a reason: it illuminates the difficult, and as yet not fully explored, path marked by the First Amendment to sustain state suppression of speech about pending judicial proceedings. The cases from *Bridges* to *Landmark* posit that broad gauge, general prohibitions on such speech enforced by a reasonable tendency standard abridge the First Amendment.

This Court's cases are unanimous in affirming the primacy of the First Amendment over government sponsored attempts to curtail speech about pending litigation. In so doing, this Court has preserved the balance struck by the framers of the First Amendment. The cases from *Bridges* to *Landmark* are also unanimous in applying the clear and present danger test to take the true measure of the threat alleged to justify suppression.²¹

In the efforts to give content to this standard by the means suggested by Justice Reed in *Pennekamp*—illustration in case by case analysis—this Court has steadily applied this standard to new and different speakers. All speakers, from the media to trial participants to court

²⁰ The vitality of the *Landmark* opinion, and its application to speech concerning pending litigation was recently re-affirmed in *Butterworth v. Smith*, 110 S. Ct. 1376 (1990), in which the Court, per Rehnquist, C.J., relied on *Landmark* to strike down a Florida statute prohibiting grand jury witnesses from disclosing information about which they testified.

²¹ Even the dissenting Justices in these cases embraced the clear and present danger standard, and thus no Justice has ever questioned the appropriateness of this as the yardstick for measuring the harm caused by speech about pending litigation.

officers, have been subjected to the same First Amendment standard and all have received the same First Amendment protection. Finally, perhaps the most important lesson learned from the march of this Court's jurisprudence from *Bridges* to *Landmark* is that the fear of harm to the administration of justice is no substitute for proof of it.

It is true that none of these cases involved petit jury trials and the special problems that they create for the efficient and fair administration of justice in our courts. All of these cases, however, involved contentions that the challenged speech prejudiced the fair and impartial functioning of equally vital components of our justice system, including judges and grand juries. Moreover, while the jury system presents somewhat different considerations for measuring the threat posed by extrajudicial speech, so too does it offer numerous effective and time-tested means of removing the risk of potential juror prejudice. Those who would suppress attorney speech in the name of juror impartiality should the burden of proof, as did their predecessors in this Court's precedent, to establish that these existing mechanisms to eliminate juror partiality are inadequate to protect fair trial rights.

Of equal importance, this Court's precedent establishes that the alleged threat to the administration of justice is not provable by the method chosen here—reliance on general prohibitions of categories of speech enforced by a reasonable tendency standard. To the contrary, the First Amendment demands that courts make an independent examination of the magnitude and imminence of injury to the administration of justice. This is not a mechanical process, and courts cannot resort to abstract categorizations about speech and its alleged harm. Rather, courts must focus on the specific context of particular speech, with the proponent of suppression bearing the burden of identifying *how* that speech threatens serious and imminent harm to fair trial interests that is not curable by alternative means. Here the State clearly did not sustain the burden mandated by this Court's rulings.

Instead, it chose to rely exclusively on the presumptive prejudice of categories of speech contained in the Rule, indeed going so far as to acknowledge the absence of any prejudice to the overall fairness of Sanders' trial. Thus the record contains no direct evidence of a potential fair trial threat.

Mr. Gentile's carefully measured statements occurred sufficiently in advance of trial to insure the absence of prejudice. The utilization of means less intrusive upon speech rights by the trial court, here a voir dire of prospective jurors, eliminated any further risk of prejudice. The trial court found it unnecessary to utilize other available tools, including individual voir dire, sequestration, continuance, or transfer, that would have been appropriate if any substantial risk of prejudice existed.²²

II. NEVADA'S ATTEMPT TO SUPPRESS CATEGORIES OF SPEECH IS INCONSISTENT WITH THE CLEAR AND PRESENT DANGER TEST AND THIS COURT'S HISTORICAL APPROACH TO THE FIRST AMENDMENT.

Three relevant principles emerge from this Court's First Amendment teaching in this area: (1) broad gauge speech bans, whether legislative, regulatory, or judicial, are constitutionally suspect; (2) punishment or suppression of narrow categories of speech must rest on a proven, clear, and imminent danger to an identified harm; and, (3) before prohibition or punishment is justified, less restrictive alternatives must be shown to be unavailable or unavailing. The rule here challenged, and its application to petitioner, violates each of these precepts.

Initially, of course, Rule 177 fails to identify the clear and present danger test as the appropriate principle to guide any analysis of limitations on lawyer speech.²³

²² The record is silent regarding any statement by the prosecution to seek further protections from prejudicial pretrial publicity beyond simple voir dire. In fact, the prosecution appears to have never raised the issue.

²³ The ABA has promulgated several different standards for attorney speech, of which Rule 3.6 is the most recent. The first,

Starting from this flawed general standard, section 2(b) of the Rule then proceeds to carve out six categories of speech which are presumed to cause prejudice. See Rule 177(2)(b); Model Rules of Professional Conduct Rule 3.6(b) (1983) (hereinafter "Rule 3.6"); G. Hazard & W. Hades, *The Law of Lawyering* 666 (2d ed. 1990) (subsection (b) creates presumptions of prejudice.) Rule 177(3)(a) then purports to create safe harbors for seven categories of speech, some of which overlap those previously categorized as presumptively prejudicial in section 2(b), as long as the speech is made "without elaboration." This substitution of categorical bans on speech for the application of reasoned judgment to specific facts is incompatible with First Amendment jurisprudence.

This Court's antipathy toward categorical speech bans finds ample reason for expression here, as the blunt tool used to attack dangerous speech inflicts injury primarily upon protected speech. Rule 177's broad speech bans are directed at a threat which is exceedingly rare—the compromise of fair trial rights based on prejudicial pretrial publicity. As this Court has recognized, "In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right." *Nebraska Press*, 427 U.S. at 551. Indeed, this Court's cases "demonstrate that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Id.* at 554.²⁴ See *Murphy v. Florida*,

Model Code of Professional Responsibility, DR7-107 (1968) (hereinafter "DR7-107") employed a reasonable likelihood of prejudice standard. Prompted by scholarly commentary and adverse judicial reaction to DR7-107, an ABA Committee chaired by Judge Goodwin of the Ninth Circuit abandoned the "reasonable likelihood" standard of DR7-107, and promulgated a standard which expressly adopted the clear and present danger test of this Court's First Amendment precedent. ABA Standards Relating to the Administration of Criminal Justice, Standard 8-1.1. The ABA promulgated Rule 3.6 in 1983, and Nevada Supreme Court Rule 177 is patterned after it.

²⁴ In *Stroble v. California*, 343 U.S. 181 (1952), for example, this Court upheld a death sentence despite the prosecution's release

421 U.S. 794 (1975); *Beck v. Washington*, 369 U.S. 541 (1962).

The speculative character of such a risk was the reason why this Court, in *Nebraska Press*, refused to uphold a court order barring the pretrial publication of a defendant's confessions. After all, few criminal cases ever get to trial due to the prevalence of plea bargaining, *Nebraska Press*, 427 U.S. at 600 (Brennan, J., concurring); recent surveys suggest that less than 10 percent of criminal cases go to a jury for resolution. See Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 *Judicature* 162 (1988). Even fewer cases attract sufficient attention to give rise to a plausible basis for concern about potential juror prejudice from publicity. And, in those isolated cases which do, the risk of juror prejudice from all sources is negligible. Indeed, one study conducted by Judge Bauer of the Seventh Circuit revealed that even in highly publicized cases, only half of one percent of prospective jurors could recall newspaper accounts they had read. *Id.* at 168.

In addition to the speculative character of potential juror prejudice, the *Nebraska Press* opinion held that alternate means of securing a fair trial were available, and the First Amendment required that they be exhausted first. *Id.* at 563-65. Nor can the burden of employing these means be cited as a rationale for limiting speech. As this Court recognized in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), the threatened danger from speech must be an evil that "rises far above public inconvenience, annoyance or unrest."

Even had the prospective jurors been exposed to Mr. Gentile's comments, they would not necessarily have been

of the defendant's confession to the press six weeks before trial; this Court concluded that the threat to a fair trial was avoided by receding publicity in the intervening six weeks and by voir dire. Indeed, in this case, Mr. Gentile testified he relied upon the *Stroble* case in making the determination that his speech, which took place six months before trial, did not pose a threat to a fair trial. (TR 95, JA 59.)

prejudiced as a result. See *Murphy*, 421 U. S. at 799; *Stroble v. California*, 343 U.S. 181 (1952). The director of the seminal University of Chicago jury study in the 1950's, Harry Kalven, concluded from his research that "the jury is a pretty stubborn, healthy institution not likely to be overwhelmed either by a remark of counsel or a remark in the press." Gillmor, *Free Press v. Fair Trial: A Continuing Dialogue—"Trial by Newspaper" and the Social Sciences*, 41 N.D.L. Rev. 156, 167 (1965) (quoting Kalven). According to another commentator, "Experiments to date indicate for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence." Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 Stan. L. Rev. 515, 528 (1977). Given the dearth of empirical evidence supporting the posited inference that attorney speech has a prejudicial impact on prospective jurors, the presumption of prejudice contained in Rule 177(2)(b) could not withstand the test this Court has required to uphold evidentiary presumptions generally. See *Ulster County Court v. Allen*, 442 U.S. 140, 165 (1979) (to be valid presumption, presumed fact must "more likely than not" flow from established fact).

Moreover, standard jury instructions direct jurors that (i) their verdicts must be based solely upon evidence admitted during trial; (ii) statements by lawyers are not evidence; and, (iii) they must disregard pretrial publicity. See 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* §§ 10.01, 10.03 (3d ed. 1977). Jury studies appear to justify the confidence our justice system has in the jury's willingness and ability to follow these and other instructions on the law. See Simon, *supra*; *Nebraska Press*, 427 U.S. at 564 (listing emphatic instructions as an alternative to speech restraints).

The effectiveness of these alternatives is evident in our nation's recent political history, as federal courts have successfully presided over such celebrated prosecutions

as those involved in the Watergate and Iran-Contra affairs. In particular, our system relies heavily upon the voir dire process to identify and to eliminate the potential influence of all sources of speech. The question raised here, of course, is whether voir dire and other available devices are inadequate to serve this same task for lawyer speech, thereby necessitating the speech regulation at issue. The heavy burden of proof in this regard falls squarely upon the State, and it must demonstrate that the traditional and time-tested methods for eliminating juror prejudice are unequal to the task of preventing prejudice attributable solely to attorney speech. See *Nebraska Press*, 427 U.S. at 570. In addition, even in those rare cases when speech poses a substantial and imminent threat to fair trial, this Court has identified yet another effective means of protecting those interests—the issuance of narrowly tailored judicial orders proscribing disclosure of prejudicial information. See *Nebraska Press*, 427 U.S. at 569.

Consequently, assessing the appropriateness of regulations on lawyer speech about pending litigation requires a balancing of the exceedingly limited risk of prejudicial publicity preventing a fair trial versus the palpable and recurrent injury to the First Amendment rights of lawyers, clients, and the public from speech suppression. In this context, petitioner submits that this Court should follow its prior First Amendment precedent and employ a clear and present danger analysis to the speech in this case.

III. THE FIRST AMENDMENT ADMITS OF NO EXCEPTIONS FOR LAWYERS.

The Nevada Supreme Court assumed that lawyers are not entitled to the same First Amendment protection enjoyed by ordinary citizens. See *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971). To the contrary, this Court has repeatedly rejected arguments that lawyers and other professionals have diminished speech rights under the First Amendment. In addition, the speech under consideration here, speech about pending litigation, also affects the First

Amendment interests of non-lawyers, including clients and the public at large. Thus, singling out lawyers for reduced First Amendment protection will not reduce the need to afford plenary constitutional protections to the speech at issue.

A. The Constitution Does Not Create a Special and Inferior Status for Speech by Lawyers.

1. This Court's Cases on Lawyer and Litigant Speakers.

This Court has previously addressed the First Amendment protections afforded lawyers and other participants in the justice system and has not hesitated to offer attorneys First Amendment protection, even when their speech did not rise to the level of core speech involved here.

Even lawyer speech about ordinary commercial transactions enjoys First Amendment protection, although not to the same degree as core speech. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456-57 (1978). This Court has treated lawyer commercial speech like any other professional speech, and it has been no less protected because of its origins than, say the speech of pharmacists or corporations.²⁵ This Court has invalidated several bar association rules limiting lawyer commercial speech as constituting abridgements of the First Amendment. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). Moreover, in these cases, the First Amendment prevailed despite arguments raised by the government that these rules were necessary to protect the legal system. See *Bates*, 433 U.S. at 375-76.²⁶

²⁵ Compare *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

²⁶ Nor does the State's interest in maintaining the "professionalism" of attorneys justify limiting attorney's First Amendment rights to advertise. *Bates*, 433 U.S. at 364.

Commercial speech imbued with more substantial First Amendment values, such as the right of association, is entitled to the full measure of First Amendment protection. Examples of such value laden commercial speech include *NAACP v. Button*, 371 U.S. 415 (1963), where this Court struck down a Virginia statute that prohibited attorneys from providing free representation, finding that litigation is "a form of political expression." *Id.* at 429.

Similarly, in *In re Primus*, 436 U.S. 412 (1978), this Court found that where a lawyer's actions "were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU," *id.* at 422, they came "within the generous zone of protection reserved for associational freedoms." *Id.* at 431. In response to the State's contention that the Rule at issue deterred a substantial evil, solicitation of clients, this Court responded that the "decision in *Button* makes clear, however, that '[b]road prophylactic rules in the area of free expression are suspect,' and that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." 436 U.S. at 432 (quoting *NAACP*, 371 U.S. at 438).²⁷

By contrast, cases involving speech about pending litigation by officers of the court or other direct trial participants is non-commercial and lies at the core of First Amendment values, for "it would be difficult to single out any aspect of government of higher concern and importance to the public than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). More to the point here, "commentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern." *Nebraska Press*, 427 U.S. at 606 (Brennan, J., concurring).

²⁷ See also *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-8 (1964) (state bar cannot prohibit labor union from selecting legal spokesman for its membership).

In the *Bridges* case for example, this Court reversed a contempt sanction of a party representative, Mr. Bridges, for speech about pending litigation by applying the traditional clear and present danger analysis. 314 U.S. 252. The same result and analysis was used to invalidate the contempt conviction of sheriff Wood, an officer of the court, in *Wood*. 370 U.S. 375. See also *In re Little*, 404 U.S. 553 (1972) (clear and present danger test applied to reverse contempt conviction of a criminal defendant who called presiding judge a "M—— F——"; citing *Craig* opinion); *Eaton v. Tulsa*, 415 U.S. 697 (1974) (reversing the criminal contempt conviction of criminal trial witness who described assailant as "chickenshit" because not "imminent" threat to the administration of justice).

This Court has repeatedly declined to relegate lawyers to an inferior status under the First Amendment when their speech relates to ordinary commercial transactions. This reluctance to single out lawyers has extended to lawyer speech imbued with First Amendment values broader than that of commercial speech. This Court has likewise refused to differentiate amongst speakers as to the level of First Amendment protection afforded their speech on pending litigation. Here, Mr. Gentile's comments on possible corruption in the Metro Police Department was the type of core speech deserving of the highest level of constitutional protection.

2. The Proper Standard for Lawyer Speech About Pending Cases.

While these and the other cases discussed above provide a sure guide to decision, this Court has never squarely addressed the issue presented here: speech by a lawyer about a pending criminal case in which the lawyer was counsel. The courts of appeals and the state courts have spoken, but without agreeing on a standard.

This Court's teachings provide no support for those state and lower federal courts who have embraced the "reasonable tendency" test, or who have believed that broad-gauge rules obviate the need for detailed fact-

finding. Examples of such mistaken and unsupported opinions include *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc), and *Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn.), cert. denied, 109 S. Ct. 3160 (1989).

Other federal and state cases do provide examples of First Amendment reasoning that attempts to follow the lead of *Bridges* and *Pennekamp*. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), is one example, and is significant in part because it was the basis for the ABA's clear and present danger standard promulgated by the Goodwin Committee. See ABA Standards Relating to the Administration of Criminal Justice, Standard 8-1.1(a) (1978), modified in February 1991. Other courts have used a similar analysis. See, e.g., *Shadid v. Jackson*, 521 F. Supp. 85 (E.D. Tex. 1981); *Markfield v. Association of Bar of City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82, appeal dismissed, 37 N.Y.2d 794, 375 N.Y.S.2d 106, 337 N.E.2d 612 (1975).

There can be no constitutional justification to assert, as the Nevada Supreme Court has done in the *Raggio* opinion, that lawyers, by virtue of their status, forfeit First Amendment rights available to the generality of citizens. See *In re Conduct of Lasswell*, 296 Or. 121, 125, 673 P.2d 855, 857 (1983). Cf. *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (State cannot condition attorney's exercise of First Amendment rights upon waiver of Fifth Amendment rights). Singling out attorney speech for inferior First Amendment protection while protecting identical speech by non-lawyers fails to advance fair trial interests while unnecessarily diluting the First Amendment rights of attorneys. The State shoulders the burden of proof to justify any departure for lawyer speech from this Court's consistent treatment of such speech by non-lawyers. Moreover, this Court has traditionally declined to authorize speech regulations based solely upon speaker status. See, e.g., *First Nat'l Bank of Boston*, 435 U.S. at 777-84 (corporate

speech not subject to restriction solely because that of a corporation). The State may not discriminate between classes of speakers. See *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

Indeed, lawyer speech has unique worth under the First Amendment, as such commentary offers the most valuable and discerning source of information about pending litigation. Justice Rutledge, in his concurrence to the *Pennekamp* opinion, coupled his pointed observation that "There is perhaps no area of news more inaccurately reported factually, on the whole, though with notable exceptions, than legal news," with the explanation that journalists cannot be faulted for misunderstanding the complexities of the law. 328 U.S. at 371. Lawyers can and do serve a useful role in translating the work of our courts for an interested public. Broad prohibitions on lawyer speech during pending litigation "produce their restrictive results at the precise time when public interest in the matter would naturally be at its height. . . . [and are] likely to fall not only at a crucial time but upon the most important topics of discussion." *Bridges*, 314 U.S. at 268.

The public's, and therefore the press's, interest in litigation is both legitimate and undeniable. Broad proscriptions on lawyer speech will not stem this tide. The growing acceptance of cameras in the courtroom is a reflection of this public interest, and early concerns over the resulting harm to fair trial interests, see *Estes v. Texas*, 381 U.S. 532 (1965), have given way to evolving accommodations between the public's interest in access and fair trial interests. See *Chandler v. Florida*, 449 U.S. 560 (1981) (televising criminal trial not a *per se* constitutional violation; absent proof of prejudice from broadcast of trial, no constitutional violation).

The best shelter for fair trial interests lies not in the enforced silence of lawyers but in the voir dire process and the other existing non-speech-related protections built into the justice system, as enforced by the prudent exer-

cise of judicial discretion. Indeed, the mischief wrought by uncounseled speech of trial participants and by the failure of trial courts to be vigilant in protecting fair trial interests is powerfully illustrated in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the case which launched the professional bar on its journey to fashion the challenged ethical rules governing counsel speech.

In *Sheppard*, the defendant had been accused of murdering his pregnant wife at their home, and these charges received "massive, pervasive, and prejudicial publicity." *Id.* at 335. Despite Sheppard's cooperation with investigating authorities, *id.*, prosecutors publicly accused Sheppard of failing to cooperate. *Id.* at 338. Sheppard then acquiesced in the coroner's request to re-enact the crime at his home before assembled law enforcement and press officials. Newspapers, quoting a local prosecutor, reported that unlike other suspects, Dr. Sheppard had refused a lie detector test. *Id.* at 339 & n.5.

Prior to trial, newspapers published the names, photographs, and addresses of prospective jurors, and each had received some communication about the case as a result. *Id.* at 342. The trial was conducted in a "carnival atmosphere," *id.* at 358, with the unsequestered jurors repeatedly exposed to lurid and "outrageous" prejudicial publicity, *id.* at 348, including statements by police officials contradicting defendant's testimony and defense. The trial court denied defense requests for a change of venue, and declined to inquire about juror exposure to publicity because it believed that the First Amendment rendered it powerless to protect against obvious threats to a fair trial. *Id.*

This Court reversed Dr. Sheppard's conviction and remanded for a new trial because of the relentless wave of prejudicial publicity, and in so doing, suggested that "courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.* at 363. Obviously, many of the prejudicial practices tolerated by the *Sheppard* trial court would shock jurists today, and presumably trial courts would

be much more vigilant to exercise their ample powers to protect fair trial interests.

The facts of the *Sheppard* case, however, additionally serve to illustrate an important point left unstated by that opinion: all of the many cited instances of prejudicial publicity originated either from the prosecution or from uncounseled comments by Dr. Sheppard.²⁸ According to this Court, "The prosecution repeatedly made evidence available to the news media which was never offered at trial. Much of the 'evidence' disseminated in this fashion was clearly inadmissible." *Id.* at 360. This is fully consistent with the expert testimony adduced in this case, (TR 26, 27; JA 20, 21) as further supported by knowledgeable commentators,²⁹ that the principal source of prejudicial pretrial publicity generally is the prosecution or its agents.³⁰ The *Sanders* case was no exception.

²⁸ The *Sheppard* opinion identified a number of press reports that emanated from the prosecution but none that came from defense counsel. The opinion's lengthy discussion of the facts concludes with the comment that "many of the prejudicial news items can be traced to the prosecution, as well as the defense." *Id.* at 361. The opinion, however, attributes no news items to the defense, and the state's interest in a fair trial was not compromised nor at issue in *Sheppard*.

²⁹ See, e.g., Matheson, *The Prosecutor, the Press, and Free Speech*, 58 Fordham L. Rev. 865, 890 n.143 (1990) ("It is well-established that reporters get most of their crime news from law enforcement sources"); Wilcox, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 Hofstra L. Rev. 1, 15, 26 (1989) (study suggests prosecutorial bias in news coverage).

³⁰ In fact, some commentators have suggested that this imbalance in the ability or penchant to engage in prejudicial pretrial publicity favors regulating only speech by the prosecution and its agents. See A. Friendly & R. Goldfarb, *Crime and Publicity: The Impact of News on the Administration of Justice* 135-36, 247-48 (1966). Indeed, a case can be made for more stringent regulations when the government engages in stigmatizing speech. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Lasswell*, 673 P.2d at 857. See generally M. Yudof, *When Government Speaks* (1983).

All this is not to say that defense counsel can never be the source of prejudicial publicity or that the prosecution is always the source of such publicity. Rather, the point is that prior to the institution of formal charges, a properly counseled defendant has a potent disincentive to engage in speech. Wholly apart from ethical obligations or fair trial concerns, defense counsel also have strong incentives for self-regulation of speech prior to trial.

The interests reinforcing defense counsel's reluctance to speak are many and varied. They include: (i) avoiding the association of a client's name with a crime; (ii) avoiding evidentiary admissions; (iii) avoiding a premature commitment to particular positions prior to complete investigation and review of the prosecution's case-in-chief; (iv) avoiding positions that could make a plea agreement difficult or impossible; and (v) preserving the ability to seek sentencing leniency under the Sentencing Guidelines for acceptance of responsibility or for cooperation with the government.³¹ As a result, the prosecution and its agents typically exercise a monopoly on speech prior to a charging decision. If this natural monopoly is abused, as here and in the *Sheppard* case, the victim will invariably be the defendant.

Much, if not all, of the potential threat to fair trial interests from the defense is answered by the good judgment and professional interests of defense lawyers. If, as here, the source of prejudicial pretrial publicity is the police, then the government can place reasonable restrictions on their speech. This Court has upheld employment-related speech restrictions on government employees under the First Amendment. See, e.g., *Connick v. Myers*, 461 U.S. 138, 151-52 (1983); *Snepp v. United States*, 444 U.S. 507 (1980).

In conclusion, lawyers are reliable, if partisan, commentators. The public, no less than juries, recognize that

³¹ See United States Sentencing Commission, Guidelines Manual §§ 3E1.1, 5K1.1 (1991).

lawyers are spokespersons for another, whether it is the State or an accused, and accordingly they speak on their client's behalf. Their speech may be viewed with trepidation by some, much as the British courts in the colonial period found the reporting of colonial newspapers unsettling; but our system of justice is sturdy enough to tolerate it without resort to broad prophylactic rules prohibiting such speech solely because it comes from lawyers.

B. Reducing the First Amendment Rights of Lawyers Will Simultaneously Reduce the First Amendment Rights of Clients and the Public.

Lawyer speech about pending litigation affects at least three distinct First Amendment interests. The first, and most obvious, are the speech rights of the lawyer. The second interest at stake is that of the lawyer's client, who relies on his lawyer to speak on his behalf. The third interest is that of the public and its First Amendment interest in obtaining information about pending matters of public concern. Each of these distinct interests offer their own independent reasons for according plenary First Amendment protection to the speech involved in this case.

Accurate speech by lawyers regarding litigation in which they are participants merits First Amendment protection. Lawyers have an important role in the administration of justice, and speech is often the only instrument at their disposal to accomplish their professional duty as advocates. While their speech rights, like those of other speakers, are not absolute, speech by lawyers serves the same objectives in a democratic society—to foster informed judgments about matters of public importance. Nor can lawyer speech in this context be trivialized as merely a species of commercial speech, even though lawyer speech of a commercial character also enjoys First Amendment protection. See *Bates*. Lawyer speech, no less than that of the press, “guards against the miscarriage of justice by subjecting the police, prosecutors, and

judicial processes to extensive public scrutiny and criticism.” *Sheppard*, 384 U.S. at 350.³²

Clients of lawyers also have an important interest in speaking through their legal representatives, and our system has long relied on lawyers to perform this task.³³ Initially, such speech serves the vital Sixth Amendment interests of a client. To be sure, the speech here arises outside the courtroom. The impact of public prosecutions, and a client's interest in responding, however, are often played out beyond the courtroom. Here, for example, Grady Sanders was compelled to close his business due to the publicized attention of law enforcement on alleged misconduct therein, and the publicity contributed to Mr. Sanders' inability to obtain a gaming license for his ground lease in Atlantic City.

Just as clients carefully select counsel because counsel's words and conduct can bind them inside a courtroom, so too must clients rely on counsel to speak on their behalf outside of court in a way calculated to assist, and not compromise, their cause. Surely the Framers of the Bill of Rights did not intend to guarantee the Sixth Amendment right to speak through counsel in a criminal trial only to withdraw the protections of the First Amendment for such speech outside the courtroom door.

Nor is it any answer to contend that clients can merely speak for themselves or through non-lawyers. As this Court recognized in *Brotherhood of R.R. Trainmen*, 377 U.S. at 7, “Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries.” Clients have a right to

³² See *Nebraska Press*, 427 U.S. at 587 (robust commentary on the criminal justice system improves “the quality of that system by subjecting it to the cleansing effect of exposure and public accountability”).

³³ The right to speak through counsel as to both law and fact was a hard won victory in English common law in the century prior to the enactment of the Sixth Amendment. See *Faretta v. California*, 422 U.S. 806, 823-28 (1975); L. Levy, *Origins of the Fifth Amendment* 322-23 (1968).

speak through their attorney, and to have the benefit of counsel's judgment and abilities in speech related to public accusations.³⁴

Finally, the public has a First Amendment interest in the speech of lawyers about pending litigation. The First Amendment protects both the source of speech and "its recipients." *Virginia Bd. of Pharmacy*, 425 U.S. at 756; accord *Procunier v. Martinez*, 416 U.S. 396, 410 (1974); *Kliendienst v. Mandel*, 408 U.S. 753, 762-63 (1972). This Court has held that the First Amendment 'necessarily protects the right to receive.' " *Virginia Bd. of Pharmacy*, 425 U.S. at 757. As applied here, the First Amendment protects the right of the public to receive information about pending litigation from participating counsel. See *Chicago Council of Lawyers*, 522 F.2d at 250 (lawyers a "crucial source of information and opinion" about justice system).

In summary, lawyer speech about pending litigation involves three distinct and independent interests, each of which merit First Amendment protection; suppression of one suppresses the others. The tension between the First and Sixth Amendments cannot be resolved by simply creating a special class of speakers, lawyers, with inferior First Amendment rights. Rather, any reconciliation between the First and Sixth Amendment interest at stake must fully satisfy each.

IV. THE CHALLENGED SPEECH RESTRICTION IS NOT NECESSARY TO PRESERVE FAIR TRIAL INTERESTS.

The speech regulation at issue, Rule 177, is not essential to the protection of fair trial interests of either the State or defendants. This Court has identified numerous

³⁴ "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Spence v. Washington*, 418 U.S. 405, 411 (1974) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)); *Healy v. James*, 408 U.S. 169, 183 (1972); see also *Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York*, 447 U.S. 530, 541 n.10 (1980).

means at the disposal of courts to prevent prejudice from extrajudicial statements. In addition, disciplinary authorities charged with regulating the conduct of lawyers outside the courtroom can sanction speech which presents a clear and present danger to the conduct of a fair trial.

A. Courts Can and Should Protect Fair Trial Interests from Extrajudicial Speech.

This Court made clear in the *Sheppard* case that it placed principal responsibility on trial judges for insuring that extrajudicial speech does not prejudice the fairness of trials. This guidance was no doubt prompted by the egregious facts of the *Sheppard* case as well as by the trial court's reluctance in *Sheppard* to take any steps to protect fair trial rights. In *Nebraska Press*, this Court held that trial courts should not issue categorical restraining orders on extrajudicial speech without a prior judicial finding that suppression of specific speech was necessary for the preservation of fair trial interests in a particular case.³⁵

These apparently conflicting signals to trial judges, in fact reflect the sound accommodation that this Court has reached in fair trial and free speech disputes. As this Court has observed, "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges*, 314 U.S. at 260. This Court has chosen to give each right its due, and has vested trial courts with substantial responsibility to pilot our system of justice on a course between the Scylla of unfair trials and the Charybdis of speech suppression on matters of public moment.

The *Sanders* case is an example of the system working smoothly, as opposed to the system under stress revealed by the facts of the *Sheppard* case. Voir dire revealed that

³⁵ Even in the context of litigation over sensitive issues of national security, narrowly tailored protective orders have been held more appropriate than broad gauge non-disclosure orders. See *Alderman v. United States*, 394 U.S. 165, 181-85 (1969).

an impartial jury could and was impaneled six months after the allegedly prejudicial remarks. The trial court did not have to resort to its considerable arsenal of more potent devices to protect fair trial interests, such as continuances, venue transfers, jury instructions, juror sequestration, speech restraint orders under authority of *Nebraska Press*, or contempt proceedings. The absence of any extraordinary measures in the record is strong evidence of the *de minimis* nature of the alleged "danger" posed by petitioner's comments. If the trial court did not have to strain to protect fair trial interests, the alleged threat to fair trial interests cannot be characterized as "extremely serious and the degree of imminence extremely high." *Bridges*, 314 U.S. at 363.

B. Disciplinary Authorities Can and Should Protect Fair Trial Interests.

Those charged with the regulation of attorney conduct do have a role in protecting fair trials. Their responsibility, however, is secondary to that of the courts. In augmenting court efforts to preserve fair trials, however, disciplinary authorities must navigate the same path between fair trial and free speech interests that the constitution requires of courts.³⁶ Accordingly, speech regulations upon attorneys must follow the same course prescribed by this Court in its march from *Bridges* to *Landmark*. Specifically, attorney speech regulations cannot, as does Rule 177, proscribe whole categories of attorney speech on the presumption that it will have a prejudicial impact regardless of the timing or circumstances of its utterances.³⁷

³⁶ The activities of integrated bar associations are equally subject to the First Amendment. *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990).

³⁷ For example, Rule 177 labels as "ordinarily" prejudicial attorney speech about the existence or contents of a confession. This Court in *Nebraska Press* invalidated a categorical ban on the pretrial publication of a defendant's confession because the threat publication allegedly posed to fair trial interests was not substantiated in the record. So too, in *Stroble* this Court upheld

The draftsman of Model Rule 3.6 chose to create categories of presumptively proscribed speech in order to provide greater clarity for lawyers. While this is a commendable end, the means chosen is constitutionally infirm. The legacy of this Court's First Amendment jurisprudence is that categorical prohibitions on speech are suspect. *Primus*, 436 U.S. at 432. This suspicion is founded on the historical experience that categorical speech proscriptions become a substitute for reasoned and independent judgments anchored in the facts of individual circumstances. The rationale for this suspicion is evident in this case, as petitioner was sanctioned upon a record containing no independent evidence of a threat to fair trial interests other than the presumption of harm in Rule 177(2)(b).

The requisite guidance for attorneys must come from the constitutional standard set by this Court for restrictions on such speech, a line that this Court has previously described as the clear and present danger test. This Court need not, and perhaps should not, attempt to draft a code for regulating attorney speech. *Nebraska Press*, 427 U.S. at 551 ("it is not the function of this Court to write a code"). Instead, as Justice Reed predicted in the *Pennkamp* case, the limits on speech compatible with the clear and present danger standard can be fixed on a case by case basis. Those who fear that this will trap the unwary attorney can take some comfort in knowing that the standard itself is a stringent one, and is therefore likely to sanction only speech which poses a serious and imminent threat to fair trial interests.

a defendant's death sentence notwithstanding the prosecution's release of the defendant's confession to the media six weeks before trial because, in the judgment of this Court, its publication did not threaten defendant's fair trial rights. Certainly, prudence would dictate caution on the part of a prosecutor before releasing a confession, but this Court has made it plain that publication of such a key item of evidence does not necessarily prejudice fair trial interests.

V. RULE 177 IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

The challenged speech regulation, Rule 177, is cast as a prohibition of certain types of utterances, coupled with a list of comments that are presumptively within its sweep, and a further list of comments which the attorney may presumably safely make. The Rule is unconstitutionally vague in that these conflicting categories of speech are contradictory, thus leaving counsel uncertain as to whether a particular utterance is both fair and foul, a status inviting discriminatory enforcement of the Rule.³⁸ Moreover, defining the permissible scope of speech as that which lacks "elaboration", is, especially as to lawyers, an unclear line. Finally, even if the categorical speech prohibitions of Rule 177 are sufficiently precise to give fair warning of proscribed conduct, they are unconstitutionally overbroad in that they also suppress protected speech.

A. Rule 177 Is Void for Vagueness.

Vague laws are infirm because their imprecision fails to give fair notice to those who would obey them and their ambiguity permits discriminatory enforcement. See *Kolender v. Lawson*, 461 U.S. 352, 358-59 (1983).³⁹ The facts of this case amply demonstrate the pernicious impact of both vices.

Mr. Gentile was found below to have violated Section 2(d) of Rule 177 which proscribes uttering "any opinion as to the guilt or innocence of a defendant or suspect in a criminal case." Section 3(a) of the same Rule, however, states that, *notwithstanding the prohibitions of Sections 1 and 2*, counsel "may state without elaboration: a. the general nature of the claim or defense." (emphasis

³⁸ Mr. Gentile, in his answer, raised discriminatory enforcement as an affirmative defense. (Answer and Affirmative Defenses to Complaint, R3-5.)

³⁹ Of these two vices of vague laws, this Court has held that the possibility of discriminatory enforcement is the greater evil to be avoided. *Kolender*, 461 U.S. at 358 (O'Connor, J.).

added). Mr. Gentile testified below that, after studying and researching these two competing directives, he viewed them as contradictory and was unsure as to what he was permitted to say on this subject "without elaboration" versus what was proscribed. (TR 93, JA 58.) No explicit attempt was made by the Nevada Supreme Court or the disciplinary authorities to reconcile these contradictory provisions of the rule.⁴⁰ The same apparent conflict arises between Rule 177(2)(a)'s prohibition of commentary about a witness's credibility or criminal record, and the authorization in Rule 177(3) to comment on, among other things, "the general nature of the defense," "information contained in a public record," the "general scope of the investigation, the . . . defense involved, . . . the identity of the persons involved," and the "identity of investigating officers or agencies."

The prospect for discriminatory enforcement implicit in such imprecise regulations is also apparent on this record. Here, defense counsel's measured comments were in response to the prosecution's patent Rule violations in disclosing prejudicial and inadmissible information, including polygraph results.⁴¹ Nevertheless, defense counsel

⁴⁰ Subsequent to the filing of Mr. Gentile's petition for certiorari to this Court, the Nevada Supreme Court amended Rule 177(1) to indicate that its general prohibition on prejudicial speech applies "notwithstanding the provisions of any . . . contrary rule." November 1, 1990 Order of Nevada Supreme Court. Presumably, this amendment indicates that the general prohibition of Rule 177(1) supercedes any exception furnished in Rule 177(3). Whether this cures or exacerbates the inconsistency between Rule 177(2) and Rule 177(3) is totally unclear.

⁴¹ For example, Rule 177(2) prohibits commentary on the "performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test." Here, the police repeatedly commented on the polygraph tests, and the fact that their witnesses passed such tests but Mr. Sanders refused to take one. Such tests are inadmissible in evidence, and lawyers are also prohibited from disseminating inadmissible evidence under Rule 177(2)(e). Nevada Supreme Court Rule 179.5 (1986), requires prosecutors to exercise care to prevent law enforcement agents from making such prohibited statements, a duty repeatedly

is thereafter subject to discipline. This is not to suggest that derelictions on the part of the prosecution excuse conduct by defense counsel. The point is that the ambiguities inherent in the Rule afford ample opportunity for its discriminatory enforcement. When the speech takes place in the context of an adversarial setting such as our criminal justice system, it does not require cynicism to ascribe discriminatory motives to the one-sided enforcement of ambiguous speech prohibitions against the victor in a heated contest.

B. Rule 177 Is Overbroad.

As this Court stated in *NAACP v. Button*, "First Amendment freedoms need breathing space to survive." 371 U.S. at 432-33. Here, the categorical speech prohibitions of Rule 177 fail to provide such space. Under this Court's overbreadth doctrine, even if a sufficiently precise law is facially applicable to a party's speech, the law may nonetheless be constitutionally invalid if it equally applies to protected speech. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Rule 177 is substantially overbroad.⁴²

Rule 177's overbreadth is implicit in its categorical approach toward proscribed speech; speech on certain subjects is presumptively prohibited regardless of the circumstances surrounding the speech.⁴³ The Rule's

and clearly unfulfilled here. Likewise the chief prosecutor's comment after arraignment that he could not bring charges unless he had proof of guilt beyond a reasonable doubt is legally incorrect and is as equally close to an opinion on guilt as anything Mr. Gentile said.

⁴² While this Court has previously held that the overbreadth doctrine should be invoked only in cases where the challenged law is substantially overbroad, the requirement of substantial overbreadth has been limited to First Amendment cases involving both speech and conduct. *Broadrick*, 413 U.S. at 615. Here, the proscribed activity is mere speech unabridged with action.

⁴³ For example, Rule 177(2)(b) asserts that publication of a confession "ordinarily" constitutes a prejudicial threat to fair

breadth is further evident in the fact that it applies to non-jury proceedings, including bench trials in criminal cases and other "adjudicative proceedings." Cf. *Craig*, 331 U.S. at 377 ("Judges are supposed to be men of fortitude, able to thrive in a hardy climate"). Moreover, the Rule's prohibitions do not even distinguish between speech by lawyers who are counsel of record and other lawyers, including journalist lawyers such as Anthony Lewis or Fred Graham. Finally, the Rule purports to apply to lawyer speech uttered without intent to prejudice the fairness of trials, a reach inconsistent with this Court's First Amendment jurisprudence. See *Scales v. United States*, 367 U.S. 203, 229-30 (1961) (First Amendment prohibits proscription of speech without requirement of specific intent). The net result is a chilling effect that withdraws whole categories of protected speech from the public arena. Accordingly, Rule 177 is fatally overbroad.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

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trial interests. In *Nebraska Press*, this Court rejected the identical assumption about publication of a confession.

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QUESTION PRESENTED

Whether Nevada Supreme Court Rule 177, governing extrajudicial statements by lawyers about pending cases, is constitutional under the First Amendment, on its face and as applied.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1836

DOMINIC P. GENTILE,
Petitioner

v.

STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR THE RESPONDENT

STATEMENT

On May 12, 1989, after an evidentiary hearing, the Southern Nevada Disciplinary Board of the State of Nevada (the "Board") recommended that petitioner, an attorney, be privately reprimanded for statements he made at a press conference about a pending criminal case in which he was counsel for the defendant (J.A. 2-5). The Board concluded that petitioner had violated Nevada Supreme Court Rule 177 ("Rule 177")¹ by commenting on the character, credibility, reputation, and criminal rec-

¹ Rule 177 is reprinted in full in Appendix A.

ords of prospective witnesses and by giving his opinion on the guilt or innocence of his client (*id.* at 5). On appeal, the Nevada Supreme Court affirmed the recommendation, finding that it was supported by clear and convincing evidence (Pet. App. 1a-5a). The court rejected petitioner's constitutional challenges to Rule 177 (*id.* at 4a).

1. In late 1987, petitioner was retained to represent a criminal defendant, Grady Sanders, on allegations relating to the theft of a large quantity of cocaine and travelers checks from a safe deposit box located at a secure storage facility owned by Sanders. The Las Vegas Police Department had been using the safe deposit box in connection with an undercover investigation. J.A. 2; Pet. App. 2a.

On February 4, 1988, Sanders was indicted by a Clark County, Nevada grand jury on eleven counts of grand larceny, trafficking in narcotics, and racketeering (J.A. 100-103, 127-29). The next day, the date of Sanders' arraignment, petitioner called a press conference (*id.* at 2). During that press conference, which was attended by electronic and print media (*id.*), he commented about a variety of matters relating to the Sanders case (*id.* at 100-103, 127-29).²

Specifically, petitioner expressed his personal opinion that Sanders was innocent of the charges. He noted that "I know I represent an innocent man" and that "I don't take cheap shots like this. I represent an innocent guy." Pet. App. 12a. He also stated that Sanders did not take a police polygraph test, adding, "I don't have much faith in polygraph tests" (*id.* at 13a).

Petitioner also offered his opinion that the perpetrator was actually a member of the Las Vegas Police Depart-

² The full text of the news conference appears at Pet. App. 8a-15a. A videotape of the news conference was introduced at the disciplinary hearing (J.A. 11-12, 16).

ment, Detective Steve Scholl. He noted that Scholl was "the person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers' checks" (Pet. App. at 8a). According to petitioner, "[t]here is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being" (*id.*). In an apparent effort to suggest that Scholl was a drug user, petitioner stated: "We've got some videotape that if you take a look at them, I'll tell you what, he [Steve Scholl] either had a hell of a cold or he should have seen a better doctor" (*id.* at 14a).³

Along these same lines, petitioner referred to the prosecution of Sanders as a "scam" (Pet. App. 10a) and stated: "I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at the Las Vegas Metropolitan Police Department and at the District Attorney's office" (*id.* at 8a). He observed that "[t]he day [the police] opened a security box . . . they had a built-in scapegoat for ripping off anything they wanted" (*id.* at 10a).⁴

Petitioner also commented on the credibility of various prospective prosecution witnesses in addition to Scholl. He noted that "the so-called other victims, . . . one, two—four of them are known drug dealers and convicted money launderers and drug dealers" (Pet. App. 8a). He added that three of them "didn't say a word about anything until after they were approached by [the Las Vegas Police Department] and after they were already in trouble and [were] trying to work themselves out of some-

³ Petitioner concedes that he "strongly implied that Detective Scholl had used cocaine in an earlier undercover operation" (Pet. Br. 9).

⁴ See also Pet. App. 13a ("They knew they had a natural scapegoat. He was there. He was built-in. You couldn't ask for a better situation."); *id.* at 10a ("I think Grady Sanders was indicted because he—he was a scapegoat the day they opened the box.").

thing" (*id.* at 8a). He also pointed out that until these victims "started going along with what Detectives from [the Las Vegas Police Department] wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them" (*id.* at 8a-9a).

With respect to the stolen cocaine that was at issue, petitioner observed that the press would learn through the proceedings "that the cops gave some of the cocaine away, which is totally unheard of, but gave away cocaine samples to people that they were trying to set up" (Pet. App. 13a). He added, "I can tell you of at least two events and maybe as much as 10 grams at a time. That's no small amount." *Id.* In response to a question about whether the stolen cocaine was used or sold by the thief, petitioner responded: "That's a lot of cocaine to use, isn't it? I don't know the answer to that. If I speculate, I'd have to say sold it." *Id.* at 14a.

2. On March 8, 1988, Justice Cliff Young of the Nevada Supreme Court sent two news articles describing the press conference to the State Bar of Nevada (the "Bar") and requested that the matter be referred to Bar Counsel for a determination of whether petitioner had violated the court's Rules of Professional Conduct (J.A. 83). On December 6, 1988, following the conclusion of the Sanders trial,⁶ the Bar filed a formal complaint against petitioner alleging that the statements at his February 5, 1988 press conference violated Rule 177 (*id.* at 4).

3. On April 17, 1989, the Board held an evidentiary hearing on the Bar's complaint. At the hearing, the Bar relied primarily on a videotape of the press conference (*see* J.A. 11-12, 16). Petitioner testified on his own be-

⁶ On August 26, 1988, Grady Sanders was acquitted of all charges (Rec. on App., Gentile Ex. A to Disciplinary Hearing, August 37, 1988 press coverage; Pet. App. 2a).

half. He indicated that the press conference at issue was the first time he had "ever set[] a time and place and call[ed] the media to that place at that time" (J.A. 42). He selected the date for the press conference—the date of Sanders' arraignment—because he "knew that once [the indictment] became public knowledge . . . the media was going to be all over the courtroom" (*id.* at 43).

Petitioner stated that the night before the press conference, he and two other attorneys had researched the issue of what an attorney could properly say to the press about a pending case (J.A. 43). Based on that research, petitioner testified that he knew that he was not permitted to "go count by count and talk about the specific credibility of each individual witness" and could not "talk about things that are not admissible in evidence" (*id.* at 44-45). He told the hearing panel that, based on his research, he did not think that he had done anything improper at the press conference (*id.* at 45).

In the same testimony, petitioner admitted commenting on the character of Detective Scholl (J.A. 50), and stated that he knew when he gave the press conference that the police detectives and many of the victims whose character he had attacked would be government witnesses (*id.* at 49). Petitioner denied that he had done anything wrong in referring generally to other victims of the theft as known drug dealers, convicted money launderers, and convicted drug dealers (*id.* at 52). He explained that his principal reason for holding the press conference was to "fight back," since "improper methods" were "used by . . . the prosecutor and the police to poison a perspective [sic] juror venire" (*id.* at 45). He noted in particular that there had been media reports that Scholl and another officer had passed polygraph tests (*id.* at 40-42). Primarily because of those media reports, petitioner believed that the press conference was "fair rebuttal given what [the prosecution] had started" (*id.* at 50).

In addition to testifying on his own behalf, petitioner offered testimony of four other witnesses—a newspaper editor and former criminal defense lawyer, another former criminal defense lawyer who served as in-house counsel to a television station, a former prosecutor, and the Federal Defender for Las Vegas. These witnesses all testified that, in their view, Nevada Supreme Court Rule 177 was unconstitutional (J.A. 18-34, 62-68, 68-74, 75-81). Indeed, each witness expressed the view that a defense attorney has an *obligation* to defend his client in the press (*id.* at 27-28, 65, 71-72, 76-77).

4. On May 12, 1989, the Board issued its Findings and Recommendations (J.A. 2-5), concluding that petitioner violated Rule 177 and thus should be privately reprimanded. The Board noted that on the day after his client's indictment, petitioner had called a press conference that was attended by both electronic and print media (*id.* at 2). After describing the press conference (*id.* at 2-3), the Board listed petitioner's admitted purposes for gathering the media: "(i) to counter public opinion which he perceived as adverse to Mr. Sanders, (ii) to attempt to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and (iv) to publicly present Sanders' side of the case" (*id.* at 3-4). Furthermore, the Board noted that petitioner knew that Scholl would be a prosecution witness and believed that the "other victims" would be as well (*id.* at 3).

The Board concluded that petitioner's statements met all of the elements of Rule 177. Petitioner knew that his statements "would be disseminated by means of public communication"; those statements "related to the character, credibility, reputation and criminal record of witnesses in the [Sanders] trial"; they "contained an opinion of the guilt or innocence of Mr. Sanders"; and they "were known or should have been known by [petitioner]

to have a substantial likelihood of materially prejudicing the Sanders trial" (J.A. 5). The Board rejected petitioner's argument that Rule 177 was unconstitutional, as well as his claim that the Bar's conduct was inequitable or amounted to selective enforcement (*id.*). In light of petitioner's violation of Rule 177, the Board recommended that he be given a private reprimand (*id.*), the lowest level of discipline. See Nev. Sup. Ct. R. 102.6.

5. Applying the "clear and convincing evidence" standard because "a higher degree of proof is required in disciplinary matters than in ordinary civil matters" (Pet. App. 3a), the Nevada Supreme Court unanimously affirmed the Board (*id.* at 2a-5a).⁶ Based on its independent review of the record,⁷ the court found that "[a] reasonable attorney, especially after having researched the issue, should have known that his conduct was improper, particularly with respect to the comments regarding the police detective and other potential witnesses" (*id.* at 3a-4a). The court noted that, while petitioner's comments caused no actual prejudice to the outcome of the trial, they had posed a substantial likelihood of material prejudice (*id.*). It pointed out that "[t]he case was highly publicized, and the press conference was held the day after the grand jury indictment and the same day as the arraignment—a time when the intensity of public interest in a notorious case is at its peak" (*id.* at 4a). The court added that "[t]he fact that these comments were timed to have maximum impact and related to the character, credibility, reputation or criminal record of the

⁶ Justice Cliff Young, who had previously informed the Bar of petitioner's statements back in March of 1988 (J.A. 83), recused himself from the case (Pet. App. 5a n.1).

⁷ The court noted that, while the Board's recommendations were "persuasive," they were "not binding" on the court, which was required to "review the record *de novo* and exercise independent judgment to determine whether and what type of discipline is warranted" (Pet. App. 3a (citations omitted)).

police detective and other potential witnesses establishes by clear and convincing evidence the substantial likelihood of material prejudice to the adjudication of [Sanders'] criminal proceeding" (*id.*). Finally, the court concluded that petitioner's constitutional challenges were without merit (*id.*).

SUMMARY OF ARGUMENT

I. Petitioner maintains that lawyers involved in pending cases should be treated the same for First Amendment purposes as the press and members of the general public. Thus, he argues, the proper legal standard is the "clear and present danger" rule of *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

Petitioner's position is contrary to the overwhelming weight of authority. This Court has repeatedly indicated that, as officers of the court, lawyers participating in judicial proceedings may be subject to speech restrictions that could not be imposed on the press.

The vast majority of lower courts have rejected petitioner's proposition that lawyers involved in pending cases should be treated the same as the press. Indeed, most courts have approved a "reasonable likelihood" of prejudice standard, which is less protective of First Amendment interests than the "substantial likelihood of material[] prejudic[e]" standard utilized in Rule 177.

In addition, petitioner's approach would render unconstitutional at least 43 states' disciplinary rules governing lawyers' extrajudicial statements. The rules in 31 states are the same, or virtually the same, as Nevada's rule, while the rule in 11 other states is a "reasonable likelihood" test that is less protective of First Amendment interests than Nevada's rule. The approach taken by other states on such matters is entitled to weight.

See, e.g., *Butterworth v. Smith*, 110 S. Ct. 1376, 113 L. Ed. 2d 670 (1990).

The current approach to lawyers' extrajudicial statements is warranted by two important considerations. First, lawyers are "officers of the court." As such they are critical to the proper functioning of our judicial system, and must be held to exacting ethical standards. Second, lawyers participating in a case have special access to information, through discovery and client communications. For that reason, their extrajudicial statements pose a grave risk because such statements are likely to be viewed as especially authoritative.

Petitioner's *Nebraska Press* standard would permit virtually no regulation of attorneys' extrajudicial statements. Under that standard, as long as an unbiased jury can be secured through, *inter alia*, voir dire, a continuance, or a change of venue, attorney speech must be permitted. Thus, for example, under petitioner's standard, an attorney could, on the eve of trial, describe to the media evidence previously ruled *in limine* to be inadmissible. Because the court could almost certainly secure an unbiased jury by postponing the trial or ordering a change of venue, the attorney could not be disciplined. Indeed, petitioner's standard, if adopted, would raise serious constitutional questions about other settled restrictions on attorney speech, such as the attorney-client privilege.

Rule 177, which is patterned after Model Rule 3.6 of the American Bar Association's Model Rules of Professional Conduct, properly balances First Amendment concerns against the need to protect the fairness of the judicial system. Specifically, Rule 177 adopts an exacting "substantial likelihood of material[] prejudic[e]" standard. To assist lawyers in applying that standard, it sets out statements that ordinarily are likely to cause such prejudice in various types of proceedings. The Rule also

specifies information that a lawyer may state without elaboration. Because of its specificity and narrow scope, Rule 177 properly addresses First Amendment concerns and is neither vague nor overbroad.

Likewise, contrary to the contentions of petitioner and amici, Rule 177 does not prevent an attorney from vigorously representing his client. A defendant has no Sixth Amendment right to have his case tried in the press. If his opponent has made prejudicial comments to the press, the defendant's protection rests with voir dire, change of venue, jury instructions, and, in extreme cases, reversal on due process grounds.

Moreover, there is no merit in the claim by petitioner and certain of his amici that Rule 177 violates the public's First Amendment rights. The Rule imposes only limited restrictions on a small category of people—lawyers involved in pending cases. Rules such as Rule 177 have been in place for decades, and there is no evidence that such rules have impeded the ability of the press to report fully and fairly on judicial matters.

II. Finally, there is no merit in petitioner's claim that he was improperly singled out for discipline. The premise of his contention—that his extrajudicial statements were permissible under Rule 177—is simply incorrect. Petitioner violated the warnings of Rule 177 by giving his opinion on his client's innocence, by discussing polygraph-related evidence, and by commenting on the character, reputation, and criminal records of the government's witnesses. Indeed, petitioner admitted at the disciplinary hearing that his very purpose in calling the press conference was to "fight back," since he believed that the prosecution had "poison[ed] a perspective [sic] juror venire" (J.A. 45). There is no evidence that the enforcement of Rule 177 against petitioner was based on anything other than his serious violations of the Rule.

ARGUMENT

I. NEVADA SUPREME COURT RULE 177 SATISFIES THE FIRST AMENDMENT

This case calls upon the Court to balance the right of free speech against the need to control statements by attorneys that threaten the fairness of the judicial process. Petitioner and his amici⁸ argue that lawyers involved in pending cases should be treated the same as the press and that lawyers' statements about such cases should be subject to virtually no regulation whatsoever. As we explain below, however, this suggestion contradicts decades of judicial decisions and disciplinary standards, which recognize the importance of controlling lawyers' comments about pending cases. It also ignores the important distinctions between the press and lawyers involved in pending cases.

In adopting Rule 177, Nevada properly balanced First Amendment and fair trial concerns. Rule 177, which is virtually identical to American Bar Association (ABA) Model Rule 3.6,⁹ is a carefully crafted rule which pro-

⁸ Amicus briefs in support of petitioner were filed by the American Newspaper Publishers Association, *et al.* ("ANPA Br."), the American Civil Liberties Union ("ACLU Br."), the National Association of Criminal Defense Lawyers ("NACDL Br."), and the Nevada Attorneys for Criminal Justice ("NACJ Br.).

⁹ On November 7, 1990, Rule 177.1 was amended (effective January 5, 1991) to add the following italicized language:

Notwithstanding the provisions of any contrary statute or rule, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The rest of Rule 177 was left unchanged. This change does not affect the substance of the Rule or affect any issue before the Court. It merely clarifies that an attorney cannot rely on another rule or statute as an excuse for violating Rule 177.

hibits extrajudicial statements by lawyers that "have a substantial likelihood of materially prejudicing an adjudicative proceeding." This standard reflects a sensitivity to free speech concerns, but it also takes into account the need to control statements by lawyers that threaten the fairness of the judicial system.

A. There Is Overwhelming Authority That Lawyers Participating in Judicial Proceedings May Be Subjected, Consistent With the First Amendment, to Speech Restrictions That Could Not Be Imposed on the Press or Members of the General Public

Petitioner argues that Rule 177 is unconstitutional because it does not incorporate the "clear and present danger" rule of *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), which is applicable to the press (Pet. Br. 29, 31). Under petitioner's proposed standard, extrajudicial statements by lawyers about pending cases cannot be prohibited unless there is clear proof that the statements "would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Nebraska Press*, 427 U.S. at 569. This standard cannot be satisfied where alternative measures, such as voir dire, change of venue, or postponement of the trial, would protect the fairness of the trial. *Id.* at 563-64. As petitioner concedes (Pet. Br. 28), the *Nebraska Press* standard is virtually impossible to satisfy, and thus means as a practical matter that almost no lawyer speech about pending cases could be subject to regulation.¹⁰ In taking this position, petitioner and amici virtually ignore the overwhelming consensus of the courts and state disci-

¹⁰ See, e.g., Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 497, 497-98 (1977) (noting that "the practical impact of the rule announced by [*Nebraska Press*] . . . is to outlaw all prior restraints in fair trial/free press cases").

plinary rules that the *Nebraska Press* standard is inappropriate in the context of attorney speech about ongoing adjudicative proceedings.

According to petitioner, "no Justice has ever questioned the appropriateness of [the clear and present danger test] as the yardstick for measuring the harm caused by speech about pending litigation" (Pet. Br. 25 n.21). In fact, while this Court has not previously faced the precise issue involved here, it has made clear in a long line of cases that lawyers' extrajudicial statements about pending cases may be subject to substantial regulation. These statements by the Court—which petitioner and amici fail to discuss—simply cannot be reconciled with the *Nebraska Press* standard.

In *In re Sawyer*, 360 U.S. 622 (1959), five members of the Court directly addressed the constitutionality of regulating attorneys' extrajudicial statements about pending cases. The Court in *Sawyer* reviewed an order affirming the suspension of an attorney from practicing law for attacking the fairness and impartiality of a judge. The plurality opinion, which found the discipline to be improper, was limited to the factual question of whether the comments had in fact impugned the judge's integrity. *Id.* at 627.¹¹ Five members of the Court, however, went on to discuss First Amendment considerations. Justice Stewart, in a concurring opinion, refused to join any possible "intimation [in the plurality opinion] that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct." *Id.* at 646. According to Justice Stewart:

A lawyer belongs to a profession with inherited standards of propriety and honor, which experience

¹¹ Because the case arose in the Territory of Hawaii, whose Supreme Court's decisions were subject to federal court review, the plurality noted that it was appropriate for the Court to resolve this factual issue. See *Sawyer*, 360 U.S. at 638-40.

has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. [¶] *Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.*

Id. at 646-47 (emphasis added).

Similarly, Justice Frankfurter, joined in dissent by Justices Harlan, Clark, and Whittaker, addressed the unique First Amendment considerations governing lawyers in pending cases:

Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer. . . . He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in the most compelling sense.

Id. at 666-68 (emphasis added). Thus, the four dissenters concluded that a lawyer should not be "constitutionally entitled to remove his case from the court in which he is an officer to the public and press. . . ." *Id.* at 668.¹²

Subsequently, in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Court echoed the strong sentiments of the *Sawyer* concurrence and dissent. In *Sheppard*, the Court held that the extensive pretrial publicity in the case had denied the defendant a fair trial. In reaching its decision, the Court explained that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged

¹² Notwithstanding the clear relevance of *Sawyer*, petitioner fails even to cite the case, as do three of petitioner's amici. Although the National Association of Criminal Defense Lawyers does cite *Sawyer*, it likewise fails to acknowledge the discussion of First Amendment issues by five members of the Court.

prejudicial matters. . . ." *Id.* at 361.¹³ The Court concluded that, although a new trial should be ordered when pretrial publicity has threatened the trial's fairness:

[W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*

Id. at 363 (emphasis added).

Ten years later, in *Nebraska Press*, the Court adopted a virtually insurmountable standard for restraining press coverage of a criminal trial. 427 U.S. at 569. See page 12, *supra*. As noted, this is precisely the standard urged by petitioner to govern lawyers' statements about pending cases. What petitioner fails to mention, however, is that the Court acknowledged the possibility that trial courts could take measures against sources other than the press to curtail prejudicial pretrial publicity. Citing the above-quoted discussion in *Sheppard*, the Court stated that it "has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity." 427 U.S. at 564.¹⁴

¹³ In support of this statement, the Court cited *State v. Van Dyne*, 204 A.2d 841, 852 (N.J. 1964), *cert. denied*, 380 U.S. 987 (1965), in which the New Jersey Supreme Court stated that prosecutors and defense lawyers could be disciplined for extrajudicial comments that "have the capacity to influence potential or actual jurors."

¹⁴ The Court added that "[p]rofessional studies have filled out these suggestions [for curtailing pretrial publicity], recommending

In a concurring opinion, Justice Brennan, joined by Justices Stewart and Marshall, elaborated on this point. While Justice Brennan stated that, in his view, a prior restraint on *the press* is not constitutionally permissible unless national security is threatened, he sharply distinguished the situation at issue here. After quoting extensively from *Sheppard*, he noted that "[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will rebound to the detriment of the accused or that will obstruct the fair administration of justice." 427 U.S. at 601 n.27. He concluded that "[i]t is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, and to impose suitable limitations whose transgression could result in disciplinary proceedings." *Id.* (citations omitted).

In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the Court addressed the authority of a district court in a class action suit to limit communications from named plaintiffs and their counsel to prospective class members. Although the Court struck down the order at issue, reasoning that it violated the policies of Federal Rule of Civil Procedure 23, it emphasized that its "decision regarding the need for careful analysis of the particular circumstances [was] limited to the situation before [it]—involving a broad restraint on communication with class members." 452 U.S. at 104 n.21. The Court noted that "the rules of ethics [for attorneys] properly impose restraints on some forms of expression" and that "[i]n the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Id.*

that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone." 427 U.S. at 564 (citation omitted). The Court did acknowledge in a footnote that it was not faced with the issue of whether "judicially imposed restraints on lawyers and others would be subject to challenge as interfering with press rights to news sources." *Id.* at 564 n.8.

Most recently, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Court unanimously upheld a trial court order restricting a newspaper, which was a defendant in a defamation suit, from publishing certain information obtained from the plaintiff during discovery. In its decision, the Court stated that "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting." *Id.* at 32-33 n.18 (citation omitted). It noted that "on several occasions [it] has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." *Id.* at 33 n.18. In support, the Court cited, *inter alia*, *Sheppard*, 384 U.S. at 361, *Gulf Oil*, 452 U.S. at 104 n.21, and both the majority opinion and Justice Brennan's concurrence in *Nebraska Press*, 427 U.S. at 563, 601 n.27.

In short, for more than three decades, this Court has acknowledged the broad authority of courts to restrict extrajudicial statements by lawyers that threaten the fairness of a judicial proceeding. There is simply no support in this Court's cases for imposing the rigid *Nebraska Press* standard in the context of lawyers' extrajudicial statements.¹⁵

¹⁵ The cases principally relied upon by petitioner in support of a clear and present danger standard (Pet. Br. 19-25) provide no support for his position. In *Bridges v. California*, 314 U.S. 252 (1941), *Pennekamp v. Florida*, 328 U.S. 331 (1946), and *Craig v. Harney*, 331 U.S. 367 (1947), the issue was whether a trial court could punish, through use of the contempt power, newspaper writers (and in *Bridges*, a labor official as well), who were *not* participants in the trial, for writing editorials, cartoons, and other items critical of judges in particular cases. Likewise, the issue in *Wood v. Georgia*, 370 U.S. 375 (1962), was whether a court in a contempt proceeding could summarily punish a sheriff for publicly criticizing a judge's orders to a grand jury. The Court emphasized that "there was no 'judicial proceeding pending' in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding." *Id.* at 389. Finally, in *Landmark Communications*,

In addition to ignoring this Court's statements on the issue, petitioner and amici ignore the fact that their proposed standard for lawyers' extrajudicial statements has been rejected by the vast majority of lower court cases. As the Solicitor General correctly points out (U.S. Cert. Br. 14), most courts that have addressed the issue have approved a "reasonable likelihood" of prejudice standard,¹⁶ which is less protective of First Amendment interests than the "substantial likelihood of material[] prejudic[e]" standard utilized in Rule 177. See pages 25-30, *infra* (discussing Rule 177).

Petitioner also fails to address the extent to which Nevada's disciplinary rule conforms to the approach taken in other states. The reason for this omission is clear: petitioner's approach would render unconstitutional at least 43 states' disciplinary rules governing extrajudicial statements. Lawyers' extrajudicial state-

Inc. v. Virginia, 435 U.S. 829 (1978), which involved a prosecution of a publisher for reporting on a pending investigation by a state judicial review commission, this Court drew a clear distinction regarding a court's ability to punish the participants in an adjudicative proceeding and its ability to punish the press for its reports about that proceeding, noting that only the latter issue was involved. *Id.* at 837; see also *id.* at 849 (Stewart, J., concurring). None of these cases even discusses the standards applicable to extrajudicial statements by lawyers involved in pending cases. Moreover, as petitioner himself concedes, "none of these cases involved petit jury trials and the special problems that they create for the efficient and fair administration of justice in our courts" (Pet. Br. 26).

¹⁶ See, e.g., *Hirschkop v. Sneed*, 594 F.2d 356 (4th Cir. 1979); *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969); *In re Hinds*, 449 A.2d 483 (N.J. 1982); *Zimmerman v. Bd. of Prof. Responsibility*, 764 S.W. 2d 757 (Tenn.), cert. denied, 109 S. Ct. 3160 (1989); *In re Disciplinary Proceedings Against Eisenberg*, 423 N.W. 2d 867 (Wis. 1988); *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); *Hughes v. State*, 437 A.2d 559 (Del. 1981); *Widoff v. Disciplinary Board*, 420 A.2d 41 (Pa. 1980), affirmed sub nom. *Cohen v. Disciplinary Board*, 430 A.2d 1151, cert. denied, 455 U.S. 914 (1982) (all upholding "reasonable likelihood of prejudice" standard).

ments about pending cases have been regulated for almost a century.¹⁷ Currently, 31 states in addition to Nevada have adopted—either verbatim or with insignificant variations—Rule 3.6 of the ABA's Model Rules of Professional Conduct, which is virtually identical to Rule 177.¹⁸ Eleven states have adopted Disciplinary Rule 7-107 of the ABA's Code of Professional Responsibility,¹⁹ which is less protective of lawyer speech than Model Rule 3.6.²⁰ Only one state, Virginia, has explicitly adopted

¹⁷ In 1908, the ABA adopted the Canons of Professional Responsibility. Canon 20 provided that extrajudicial comments by lawyers about pending or anticipated litigation were "[g]enerally . . . to be condemned." See generally G. Archer, *Ethical Obligations* 200 (Little Brown 1910) ("If a lawyer, either through a desire for personal notoriety, or with an intent to injure the adverse party, gives out [to newspapers] facts or allegations of facts that should properly be reserved until the trial day, he is guilty of improper conduct.").

¹⁸ Arizona, Arkansas, Connecticut, Idaho, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Mexico, Pennsylvania, Rhode Island, South Carolina, West Virginia and Wyoming have adopted Model Rule 3.6 verbatim. Delaware, Florida, Louisiana, Montana, New Hampshire, New Jersey, New York, Oklahoma, South Dakota, Texas, and Wisconsin have adopted Model Rule 3.6 with minor modifications that are irrelevant to the issues presented in this case. Michigan and Washington have adopted only subsection (a) of Model Rule 3.6. Minnesota's Rule 3.6, which consists of only subsection (a) of the Model Rule and limits its application to "pending criminal jury trial[s]," is likewise jeopardized by petitioner's approach. Utah employs a version of Model Rule 3.6 including a "substantial likelihood of material[] influenc[e]" standard which, arguably, is less protective of lawyer speech than Model Rule 3.6 and Rule 177. See generally Appendix D (citations to state rules governing lawyers' extrajudicial statements).

¹⁹ Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, Ohio, Tennessee and Vermont have adopted D.R. 7-107 verbatim. North Carolina also uses the "reasonable likelihood" test of D.R. 7-107.

²⁰ As explained on page 27, *infra*, the ABA replaced D.R. 7-107 with Model Rule 3.6 to insulate more statements by lawyers from regulation.

a clear and present danger standard.²¹ The fact that petitioner's approach has been rejected in the vast majority of states is without question probative and entitled to weight. See *Butterworth v. Smith*, 110 S. Ct. 1376, 1383 (1990) (noting, in striking down a Florida rule prohibiting a grand jury witness from ever disclosing his testimony before that body, that only 14 other states had such a rule; Court found such statistics "probative of the weight to be assigned Florida's asserted interests"); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978).

B. The Present State of the Law Is Well-Justified by Unique Considerations Applicable to Lawyers Handling Pending Cases in Court, Which Justify Many Restrictions on Their Speech That Could Not Be Imposed on Others

In urging the *Nebraska Press* standard in the context of lawyers' extrajudicial statements about pending cases, petitioner overlooks the fundamental principle that First Amendment considerations must be "applied in light of the special characteristics of the . . . environment."

²¹ Four states and the District of Columbia have adopted standards that arguably approximate "clear and present danger": Illinois ("serious and imminent threat to the fairness of an adjudicative proceeding"); Maine ("substantial danger of interference with the administration of justice"); North Dakota ("serious and imminent threat of materially prejudicing an adjudicative proceeding"); Oregon ("serious and imminent threat to the fact finding process of an adjudicative proceeding and acts with indifference to that effect"); and the District of Columbia ("serious and imminent threat to the impartiality of the judge or jury"). Alabama adopted Model Rule 3.6 verbatim, but the comments to that state's provision cast doubt on the standard by which attorney's extrajudicial statements should be judged. California has no express provision dealing with attorneys' extrajudicial comments about pending cases. Cf. *Younger v. Smith*, 30 Cal. App. 3d 138, 165, 106 Cal. Rptr. 225 (1973) (applying "reasonable likelihood of prejudice" test in context of gag order on all attorneys connected with the case).

Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969).²² As the above-quoted statements in *Sawyer*, *Sheppard*, *Gulf Oil*, *Nebraska Press*, and *Seattle Times* make clear, two related factors are critical in analyzing the First Amendment issues involved here: the lawyer's role as an officer of the court and his role as an advocate in a pending adjudicative proceeding. These factors distinguish lawyers from the press and other non-participants in the trial process.

It is beyond dispute that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary government function of administering justice and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). More than a century ago, the Court stated that attorneys were required to comply with court-imposed ethical standards requiring "respect due to courts . . . and judicial officers" both inside and outside the courtroom. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 355 (1871). Violation of such standards, the Court noted, could subject an attorney to discipline, "such as reprimand, temporary suspension, or fine. . . ." *Id.* The Court has made numerous similar statements over the

²² The Court has applied this principle in a variety of contexts. See, e.g., *Thornburgh v. Abbott*, 109 S. Ct. 1874 (1989) (government regulation of prisoner access to publications are valid if reasonably related to legitimate penological interests); *Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562 (1988) (educators do not violate First Amendment by exercising editorial control over student newspaper in order to further legitimate pedagogical concerns); *Connick v. Myers*, 461 U.S. 138 (1983) (public employee may be disciplined for speech about matters that are not of public concern); *Parker v. Levy*, 417 U.S. 733, 758 (1974) (military may punish speech in ways that would be impermissible outside the military); see also *Theard v. United States*, 354 U.S. 278, 281 (1957) ("Membership in the bar is a privilege burdened with conditions."). As these cases demonstrate, petitioner errs in stating (Pet. Br. 35-36) that the status of the speaker is irrelevant to First Amendment analysis.

years. See pages 12-17, *supra*; see also *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (noting that "[t]he judiciary as well as the public . . . has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice") (citations omitted).

There is no objective more critical in the administration of justice than ensuring that trials are conducted fairly, based on the evidence in court. As this Court has stated, "trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspapers." *Bridges v. California*, 314 U.S. 252, 271 (1941). Rather, the results should "be induced only by evidence and argument in open court. . . ." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). To achieve these objectives, courts must depend on lawyers not to "resort to the media for public favor in a pending action. . . ." ABA Advisory Comm., *Standards Relating to Fair Trial and Free Press* 86 (Tentative Draft 1966). It is difficult to conceive of anything more inimical to the role of an "officer of the court" than a lawyer involved in a case who uses the press to influence the outcome of a trial.

Moreover, as participants in a particular case, lawyers have special access to information, including confidential statements from clients and information obtained through pretrial discovery or plea negotiations. For this reason, their extrajudicial statements pose the greatest possible threat because they are likely to be received as especially authoritative. See, e.g., *In re Hinds*, 449 A.2d 483, 496 (N.J. 1982) (statements by attorneys of record relating to the case "are likely to be considered knowledgeable, reliable and true" because of attorneys' unique access to information); *In re Rachmiel*, 449 A.2d 505, 511 (N.J. 1982) (attorneys' role as advocates gives them "extraordinary power to undermine or destroy the efficacy of the criminal justice system"). Cf. *Seattle Times*, 467 U.S. 20 (holding that a newspaper that was a party to

a case could be prevented from disseminating information obtained through pretrial discovery); *Sawyer*, 360 U.S. at 667 (Frankfurter, J., dissenting) ("The delicate scales of justice ought not to be willfully agitated from without by any of the participants responsible for the fair conduct of the trial.").

A few examples will illustrate why the *Nebraska Press* standard makes no sense in the context of lawyers' extrajudicial statements. Assume that a trial judge in a criminal case has ruled three months prior to trial that (1) a key prosecution witness cannot be impeached with evidence that he is a member of the Mafia, and (2) the defendant's confession to the police was involuntary and may not be offered at trial. Under *Nebraska Press*, it is highly unlikely that the press could be prohibited from publishing information about the witness' alleged Mafia ties or about the defendant's confession. Considering less restrictive alternatives, it is probable that voir dire, postponement of the trial, change of venue, and/or jury instructions could dissipate the impact of such an account, thereby making it possible that 12 jurors could be found who could base their decision solely on the evidence adduced at trial. Cf. *Nebraska Press*, 427 U.S. at 563-64; Pet. Br. 28-31. This standard is necessary to ensure a vigorous press. But under petitioner's standard, the defense lawyer, immediately upon receiving the court's ruling, could call a press conference for the purpose of disseminating information about the prosecution witness to prospective jurors. Similarly, the prosecutor could assemble the press and read the text of the defendant's confession. In both situations, the lawyers could not be disciplined.

Similarly, under the *Nebraska Press* standard, the state bar authorities would be precluded from (1) disciplining the defense lawyer for standing outside the courthouse and announcing to prospective jurors the prosecution witness' Mafia ties, or (2) disciplining the prosecutor for standing in that spot and handing out printed

copies of the defendant's confession. Since the judge can simply postpone the trial until a new jury venire begins service, or identify jurors (through an extremely detailed and time consuming voir dire) who did not receive the inadmissible evidence, neither the defense lawyer nor the prosecutor would have created a "clear and present danger" under the *Nebraska Press* standard. We submit that it would be absurd to conclude that the bar authorities would be forbidden by the First Amendment to discipline the prosecutor or defense lawyer in these situations.

If accepted by this Court, petitioner's approach would communicate to lawyers that they now have broad freedom to influence potential jurors through the press. Lawyers would increasingly publicize their opinions on the merits of their cases, highlight inadmissible or questionable evidence, and discuss the credibility of key witnesses. Indeed, lawyers would be free to use extensive media coverage as a tactic for prejudicing potential jurors when the goal is to seek a continuance or a change of venue. Rules such as Rule 177 were adopted precisely to protect the judicial system from this type of conduct by lawyers.

To prevent the foregoing results, courts would inevitably be forced to interpret the *Nebraska Press* standard to allow discipline in such situations. The result would be a dilution of the rigorous *Nebraska Press* standard—to the serious detriment of the press.

Moreover, if the *Nebraska Press* standard were applied to lawyers in pending cases, a whole array of common ethical restrictions would be open to serious constitutional question. For example, Nevada, like other states, requires lawyers to keep client confidences (Nev. Sup. Ct. R. 156); to avoid conversing with jurors "[b]efore or during trial . . . on any subject whether pertaining to the case or not" (Nev. Sup. Ct. R. 176.1); and to avoid, in post-trial juror interviews, saying anything that would "embarrass[]" any juror or that would "in-

fluence his or her action in subsequent jury service" (Nev. Sup. Ct. R. 176.3). Cf. *Gulf Oil*, 452 U.S. at 104 n.21 (approving D.R. 7-104, which prohibits, *inter alia*, a lawyer representing a client from communicating directly with the opposing party without opposing counsel's consent, unless specifically authorized by law). Petitioner and amici cannot seriously argue that a lawyer should be treated like the press and laypersons in these circumstances and that, notwithstanding the ethical rules, all communications by lawyer are permissible unless the *Nebraska Press* standard is satisfied. Yet their position—which fails to recognize the unique status of lawyers involved in pending cases—admits of no other reasonable construction.

C. Rule 177's Substantial Likelihood of Material Prejudice Test and Specific Provisions Elaborating Upon That Test Properly Balance the Protection of Judicial Integrity and Fairness Against First Amendment Interests

This Court's cases make clear that when a state regulation implicates the First Amendment rights of trial participants, the Court must balance those interests against the state's legitimate interests in regulating the activity in question. See, e.g., *Seattle Times*, 467 U.S. at 32. Specifically, the Court must "consider whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the governmental interest involved.'" *Id.*, quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).²³ Viewed in this light, Rule 177 passes constitu-

²³ The *Seattle Times* test is applicable because, like the newspaper/defendant in that case, attorneys involved in pending cases have special access to information, through discovery and otherwise. See page 22, *supra*. It differs somewhat from the test articulated in *Butterworth*, which required a showing of "a need to fur-

tional muster. The Rule is carefully drawn to protect the integrity and fairness of Nevada's judicial system, while imposing only narrow and necessary limitations on lawyers' speech.

In attacking Rule 177, petitioner sets up a straw man by mischaracterizing it as a "reasonable likelihood" of prejudice or "reasonable tendency" standard (see Pet. 10, 12; Pet. Cert. Reply Br. 2, 3, 7; Pet. Br. 26). In fact, Rule 177, which is virtually identical to Model Rule 3.6,²⁴ adopts a far more exacting standard—"substantial likelihood of materially prejudicing an adjudicative proceeding."

The history of Model Rule 3.6 confirms that it is a more exacting standard than prior rules governing lawyers' extrajudicial statements. In 1968, in response to this Court's 1966 *Sheppard* decision, the ABA established an Advisory Committee on Fair Trial and Free Press, chaired by Justice Paul Reardon of the Massachusetts Supreme Court. Justice Reardon's committee recommended that the ABA adopt a "reasonable likelihood of prejudice" standard to govern lawyers' extrajudicial statements.²⁵ The following year the ABA adopted D.R.

ther a state interest of the highest order" to support a permanent ban on disclosure by a witness of his own grand jury testimony. 110 S. Ct. at 1381, quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). There the Court relied on the fact that the witness did not have special access to information "as a result of his participation in the [grand jury] proceedings" and distinguished *Seattle Times* on that ground. The *Seattle Times* standard is also appropriate here because lawyers are officers of the court and are subject to special ethical restrictions. See pages 21-22, *supra*. Even if the Nevada State Bar were required to show a compelling state interest, however, that requirement would be satisfied in light of the State's paramount interest in ensuring the fairness of judicial proceedings. See pages 28-30, *infra*.

²⁴ Model Rule 3.6 is reprinted in full in Appendix B.

²⁵ ABA, *Standards Relating to Fair Trial and Free Press 1* (Approved Draft 1968); see also Committee on the Operation of the Jury System, Judicial Conference of the United States, Report

7-107, which incorporated that recommendation. See Appendix C, *infra* (reproducing D.R. 7-107).

In 1983, the ABA adopted the Model Rules, including Model Rule 3.6. Nevada adopted Model Rule 3.6 in January 1986. Nev. Sup. Ct. R. 177. This Rule incorporates a "substantial likelihood of material[] prejudic[e]" standard. The comments and notes to Model Rule 3.6 confirm what the plain language reveals—that the purpose of the change from the "reasonable likelihood" standard was to make it more difficult to discipline an attorney for extrajudicial statements. See ABA Model Rules of Professional Conduct, Proposed Final Draft and Comments ("Proposed Final Draft") 143-45 (May 30, 1981) (explaining that the standard was revised in light of constitutional problems with D.R. 7-107 identified by two court decisions).²⁶

of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 404 (1968) (making similar recommendation). Cf. *Sheppard*, 384 U.S. at 362-63.

²⁶ The notes accompanying the Proposed Final Draft, which were not incorporated into the official Rules and Commentary, see ABA Model Rules of Professional Conduct (Rev. ed. 1989), state that the Rule "incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality." Proposed Final Draft at 145. This reference to the clear and present danger test was presumably included to indicate that the Rule embodies a relatively strict standard under which only a small portion of attorney speech will be prohibited. It cannot reasonably be understood to suggest that the Rule's "substantial likelihood of material[] prejudic[e]" test and other detailed provisions should simply be read as a surrogate for this Court's jurisprudence on prior restraint of the press. The Rule is far too explicit to admit of such a construction, and plainly contemplates restrictions on speech that could not be imposed on the press. Moreover, the phrase "clear and present danger" is not the sort of "technical legal doctrine" or "formula for adjudicating cases," *Landmark Communications*, 435 U.S. at 842, quoting *Pennickamp*, 328 U.S. at 353, that would carry such an implication.

To the extent that one might read the note as suggesting that the Rule has adopted the *Nebraska Press* standard, it is incorrect. We agree with petitioner that the text of Rule 177 makes clear

To assist the lawyer in deciding whether an extrajudicial statement is likely to cause material prejudice, the Rule sets out statements that, in civil jury cases, criminal cases, and other proceedings that could result in incarceration, ordinarily are likely to cause such prejudice.²⁷ These include, *inter alia*, statements relating to the character, credibility, reputation, or criminal record of a party, criminal suspect, or witness; the expected testimony of a party or witness; the performance or results of examinations or tests or the refusal of a person to submit to an examination or test; and any opinion as to the guilt or innocence of a defendant or suspect in a criminal case. Rule 177.2. See Appendix A, *infra*. This list closely tracks language in this Court's *Sheppard* decision.²⁸ The Rule also specifies information that a lawyer "may state without elaboration," including, *inter alia*, the general nature of the claim or defense and information in public records. See Rule 177.3.

As its text reveals, Rule 177 is aimed at "prejudic[e] to an adjudicative proceeding." This formulation encom-

that it is less exacting than the *Nebraska Press* standard. Cf. Nev. Sup. Ct. R. 150 ("The preamble and comments to the A.B.A. Model Rules of Professional Conduct are not enacted by this Rule but may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments.").

²⁷ Contrary to petitioner's contention (Pet. Br. 45-46), these are not evidentiary presumptions. Rule 177 was specifically designed to avoid the categorical prohibitions of attorney speech contained in D.R. 7-107. See Notes to Proposed Final Draft at 143-44.

²⁸ In *Sheppard*, the Court stated that the trial court in that case could have proscribed prejudicial extrajudicial statements by lawyers and other participants, "such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." 384 U.S. at 361 (citations omitted).

passes two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Obviously, an outcome affected by extrajudicial statements is an evil to be avoided. See, e.g., *Sheppard*, 384 U.S. at 350-51; *Turner v. Louisiana*, 379 U.S. 466, 473 (1965) (evidence in criminal trial must come solely from witness stand in public courtroom with full evidentiary protections); *Patterson*, 205 U.S. at 462. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial. See, e.g., *Estes v. Texas*, 381 U.S. 532, 540 (1965) (describing the right to a fair trial as "the most fundamental of all freedoms").

Even if a fair trial can ultimately be ensured through voir dire, change of venue, or another device, the poisoning of the venire entails serious costs. The system suffers greatly when one potential juror after another is excused because of knowledge obtained from a lawyer's extrajudicial statements. As is typically the case where there is pretrial publicity, it will often be the better-informed jurors who are thereby disqualified. If a juror proclaims that he or she will not be influenced by a participating lawyer's statement, and is allowed to serve, a serious shadow is nonetheless cast over the trial as it proceeds. If more extreme measures, such as change of venue or continuance, are required, the costs to the system are considerable. Officers of the court should not be allowed to inflict such costs on the judiciary. Cf. *Hinds*, 449 A.2d at 495 n.5 (noting that options such as voir dire, change of venue, and jury instructions "do not obviate the need for properly fashioned restrictions on extrajudicial speech of attorneys participating in criminal trials"); *State v. Van Dwyne*, 204 A.2d 841, 852 (1964) (noting need to discipline lawyers whose statements are likely "to influence potential or actual jurors").²⁹

²⁹ Numerous ethical standards are applicable to conduct affecting both actual and prospective jurors. See, e.g., Nev. Sup. Ct. R. 174

In sum, Rule 177 is aimed at a critical objective—protecting the integrity of the judicial system. The standard adopted is an exacting one: only when there has been a serious threat to the system will an attorney's extrajudicial statements about a pending case warrant discipline.

D. Rule 177 Is Neither Vague nor Overbroad

In a brief discussion citing virtually no authority, petitioner invokes the void-for-vagueness and overbreadth doctrines, claiming that (1) Rule 177 did not provide him with adequate notice that his comments were subject to discipline, and (2) the Rule is facially unconstitutional because it applies to more speech than is necessary to serve the state's goals (Pet. Br. 46-49). These arguments are meritless.

The "void-for-vagueness" doctrine involves considerations of fair notice and adequate warning. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *Colton v. Kentucky*, 407 U.S. 104, 110 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The Rule was carefully drafted with such considerations in mind to provide "an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice." Proposed Final Draft at 143. Plainly, the Rule provides ample notice of the nature of the prohibited conduct, particularly for lawyers. *See generally Matter of Keiler*, 380 A.2d 119, 126 (D.C. App. 1977) ("language of a rule setting guidelines for members of the bar need not meet the precise standards of

(providing that a lawyer shall not "[s]eek to influence a . . . juror [or] prospective juror . . ."); Nev. Sup. Ct. R. 176.1 (prohibiting currying favor of jurors "[b]efore and during the trial"); Nev. Sup. Ct. R. 176.2 (requiring lawyer to disclose to judge and opposing counsel information bearing on the interest of any juror or prospective juror in the outcome of a case); Nev. Sup. Ct. R. 176.4(b) (prohibiting "direct or indirect communication with a prospective juror").

clarity that might be required of rules of conduct for laymen"), *overruled on other grounds, In re Hutchinson*, 534 A.2d 919 (D.C. App. 1987).

Indeed, under the present circumstances, petitioner's lack of notice argument can only be viewed as disingenuous. As explained on pages 35-37, *infra*, petitioner plainly had as his primary objective the violation of Rule 177's core prohibition—to prejudice the upcoming trial by influencing potential jurors. Moreover, while criticizing the Rule as providing inadequate notice, petitioner also attacks it in another section of his brief for setting out categories of speech that are likely to be prejudicial (Pet. Br. 44-45). *See* note 27, *supra*. Petitioner cannot have it both ways—arguing simultaneously that the Rule is both too detailed and not detailed enough.

The "overbreadth" doctrine applies if an enactment "prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). To be unconstitutional, overbreadth must be "substantial." *Board of Trustees of State University of New York v. Fox*, 109 S. Ct. 3028, 3037 (1989); *New York v. Ferber*, 458 U.S. 747, 769 (1982).³⁰ The doctrine has been described as "'manifestl[y] strong medicine' that is employed 'sparingly, and only as a last resort.'" *Massachusetts v. Oakes*, 109 S. Ct. 2633, 2637 (1989), *quoting Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Petitioner fails to raise a claim of substantial overbreadth—or, in fact, *any* overbreadth at all. Rule 177 is no broader than necessary to protect the State's interests. Rule 177 applies only to lawyers involved in the pending case at issue,³¹ not to other lawyers or to non-lawyers.

³⁰ Petitioner errs in arguing (Pet. Br. 48 n.42) that in the case of pure speech, overbreadth need not be substantial to violate the First Amendment. *See, e.g., Brockett v. Spokane Arcades*, 472 U.S. 491, 503 n.12 (1985), *citing Ferber*, 458 U.S. at 772.

³¹ Although parts one and two of Rule 177 do not specifically so state, Rule 177.3, by its terms, applies only to "a lawyer involved

Moreover, even lawyers involved in pending cases can make extrajudicial statements as long as such statements do not present a substantial risk of material prejudice to an adjudicative proceeding. Indeed, Rule 177.3 identifies a variety of statements that lawyers in pending cases can make. In sum, the Rule is drafted narrowly so that it encompasses only statements that are very likely to prejudice an adjudicative proceeding.³²

in the investigation or litigation of a matter" In applying Rule 177, the Nevada Bar has consistently read that same limitation as applying to all three parts of the Rule. We know of no cases applying Rule 177 or Model Rule 3.6 to lawyers *not* involved in a proceeding, and petitioner fails to cite any. The Rule's clarity on this point derives in part from the fact that Model Rule 3.6 (from which Rule 177 was derived) was designed to provide *greater* free speech protections to lawyers than D.R. 7-107, which, by its terms, applied to "[a] lawyer or law firm associated with" a criminal or civil matter. *Cf. Hinds*, 449 A.2d at 496 (explaining meaning of "associated with" under D.R. 7-107). There is nothing to suggest that the ABA, in adopting Model Rule 3.6, intended to expand the coverage of D.R. 7-107 to include lawyers *not* associated with a case.

³² Petitioner claims that Rule 177 is overbroad because it applies to bench trials (Pet. Br. 49). The Rule's "substantial likelihood of material[] prejudic[e]" test will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount it. Notes to Model Rule 3.6 (Proposed Final Draft at 146). Nonetheless, as the notes to Model Rule 3.6 state, the infrequency or actual violations does not justify a conclusion that the Rule is categorically inapplicable in that setting. *Id.*

Petitioner's assertion that Rule 177 is overbroad because it subjects to discipline speech made without intent to prejudice trials (Pet. Br. 49) is likewise without merit. *Scales v. United States*, 367 U.S. 203, 229-30 (1960), cited by petitioner, is not to the contrary. That case discussed the requirements for convicting persons under the Smith Act, 18 U.S.C. § 2385, for belonging to organizations espousing overthrow of the United States Government by force or violence. The case cannot be read to stand for the proposition that in all contexts a state may prohibit only speech

E. Rule 177 Does Not Prevent an Attorney From Vigorously Representing His Client and Does Not Seriously Hamper the Press From Reporting News to the Public

Petitioner, joined by various amici, argues that Rule 177 raises Sixth Amendment concerns because it prevents a lawyer from adequately representing his client (Pet. Br. 41; NACDL Br. 9; NACJ Br. 21). In addition, the American Newspaper Publishers Association, *et al.*, argues that Rule 177, by restricting comments that lawyers can make to the press, unconstitutionally deprives the public of important information (ANPA Br. 7). These arguments lack merit.

The Sixth Amendment argument erroneously assumes that a lawyer has a constitutional obligation to taint potential or actual jurors by trying his case in the press. No case holds or suggests that there is any such obligation. Indeed, this Court has made clear that cases should be tried in court, not in the press. *See, e.g., Bridges*, 314 U.S. at 271; *Patterson*, 205 U.S. at 462. Nor is such a Sixth Amendment question created if a lawyer is responding to public comments by his opponent. A defendant's protection rests with voir dire, change of venue, jury instructions, and, in extreme cases, reversal on due process grounds. The proper remedy for prosecutorial abuses of the press is not to permit virtually all extrajudicial comments by lawyers, but instead to discipline prosecutors who violate the Rule.³³ Indeed, a public re-

made with specific intent to harm the interest the government seeks to protect. A statement can prejudice a proceeding even if it was made recklessly or negligently. Plainly, a lawyer is expected to know and follow the ethical rules, and should not be able to invoke a First Amendment defense simply because he did not intentionally violate such a rule.

³³ *See, e.g., In re Hanson*, 584 P.2d 805 (Utah 1978) (Attorney General held in violation of DR 7-107). Any argument that prosecutors are somehow not reasonably subject to discipline should be given short shrift by this Court. Absent some law to the con-

sponse "may well aggravate the prejudice to the defendant, particularly if it induces a further response by the prosecution, and may render more difficult the obtaining of judicial relief." ABA Advisory Comm., *Standards Relating to Fair Trial and Free Press* 86 (Approved Draft 1968). Furthermore, Rule 177 does not interfere with the formation of the attorney-client relationship and does not hamper the ability of organizations to bring cases of public significance. Cf. *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).

The argument that the public's First Amendment rights are violated is equally groundless. Rule 177 is not inconsistent with a vigorous press or an informed public. That Rule neither "close[s] the door of permissible public comment," *Pennekamp*, 328 U.S. at 350, nor creates an "endless series of moratoria on public discussions." *Bridges*, 314 U.S. at 269. The only voices regulated are those of the attorneys participating in trial; only information that poses a substantial likelihood of materially prejudicing the adjudication is proscribed; and the Rule poses no restrictions once the trial is over. Cf. *Butterworth*, 110 S. Ct. 1376 (invalidating Florida statute imposing permanent ban on disclosure by a witness of his own testimony once a grand jury has been discharged).

trary—and none has been cited—state prosecutors are governed by the ethical rules of their state bars. As to federal prosecutors, it is true that in case of conflict between state ethical rules and federal law, federal law must govern under the Supremacy Clause. U.S. Const. art. VI, cl. 2. But such conflicts are rare, at best. See 28 C.F.R. § 50.2(b)(2) (Department of Justice regulation governing pending criminal proceedings, which uses a "reasonable likelihood" standard); see also, e.g., S.D. Fla. Ct. Gen. Local R. 21(A)(1); N.D. Ga. Ct. Gen. Local R. 115(2)(a); W.D. Mo. Ct. Gen. Local R. 5(A); D. Mont. Ct. Gen. Local R. 130(1)(b); E.D. Va. Ct. Gen. Local R. 8(A) (all prohibiting lawyers' comments in various circumstances under "reasonable likelihood" standard). And to the extent that there is no conflicting federal provision or duty, it seems highly likely that the state bar ethical provisions will be recognized as binding on federal prosecutors, as a matter of federal common law.

Moreover, information can—and will—reach the public, from the press and from sources other than the lawyers involved. For instance, nothing in Rule 177 prevents lawyers not in a trial from providing commentary about a pending case, and nothing prevents news organizations from hiring lawyers as consultants for legal matters. Indeed, both of these approaches are very common, as the press coverage of any prominent case demonstrates. Moreover, this Court's decisions have ensured that, except in extraordinary situations, the press will have full access to trials and other judicial proceedings. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Significantly, no evidence is cited to suggest that rules such as Rule 177 have hampered the ability of the press to provide information, even though such a rule—or a less exacting one—exists in 43 states. See pages 18-20, *supra*. Nevada is simply urging this Court to approve rules governing lawyers' extrajudicial statements that have co-existed for decades with a free and vigorous press.

II. RULE 177 WAS APPLIED FAIRLY IN THIS CASE

Petitioner maintains that his extrajudicial statements were carefully "measured" based on a thorough study of Rule 177 (Pet. Br. 47). According to petitioner, the fact that the prosecution was not disciplined demonstrates that the Nevada Bar acted with "discriminatory motives" (*id.* at 48).

This argument is frivolous. There is no evidence that disciplinary proceedings were brought because petitioner obtained an acquittal or for any other improper motive. Justice Young referred the matter to the Bar in March of 1988, only weeks after the press conference and months before the trial (J.A. 83). He based the referral on newspaper accounts of the press conference. There is nothing improper about the fact that formal charges were

not brought until after the Sanders trial was over. Obviously, the Bar did not want to undermine petitioner's defense of his client by bringing proceedings before or during trial.

More fundamentally, petitioner's argument is based on the false premise that his extrajudicial statements were permissible under Rule 177. In fact, however, there can be no serious question that petitioner violated Rule 177. Contrary to the warning of Rule 177.2(d), he discussed at length his personal opinion on the innocence of Grady Sanders, stating, for example, that "I know I represent an innocent man" (Pet. App. 12a).³⁴ Contrary to the warning of Rule 177.2(c), he disclosed Sanders' failure to take a polygraph test and opined that polygraph tests are unreliable (Pet. App. at 13a). And, contrary to the warning of Rule 177.2(a), he commented at length on the character, reputation, and criminal records of the government's witnesses. In addition to opining that Scholl was the culprit, petitioner also suggested that Scholl was a cocaine user (Pet. App. 14a). He also characterized the other theft victims as "known drug dealers and convicted money launderers and drug dealers" (*id.* at 8a).³⁵

While petitioner points out that his comments were made six months before trial (Pet. Br. 28 n.24), the critical fact, as the Nevada Supreme Court noted, is that he

³⁴ To bolster his claim that Sanders was innocent, he opined that Detective Steve Scholl was in fact the perpetrator (Pet. App. at 8a).

³⁵ Petitioner states that his comments were all admissible at trial (Pet. Br. 8). In fact, a lawyer is prohibited from "stating a personal opinion as to . . . the credibility of a witness . . . or the guilt or innocence of an accused," or from "allud[ing] to any matter that . . . will not be supported by admissible evidence." Nev. Sup. Ct. R. 173.5; *see also United States v. Young*, 470 U.S. 1, 8-9 (1985) (neither prosecution nor defense may inject personal beliefs into presentation of case); *Yates v. State*, 734 P.2d 1252 (Nev. 1987) (same).

selected the time of maximum press coverage—the date of Sanders' arraignment (Pet. App. 4a). He admitted selecting the date because he "knew that once [the indictment] became public knowledge . . . the media was going to be all over the courtroom." (J.A. 43).

Finally, while the Nevada Supreme Court stated that there was no actual prejudice to the trial (Pet. App. 4a), there is no question that the comments had a substantial *likelihood* of materially prejudicing the jury venire. Indeed, at his disciplinary hearing, petitioner admitted that his very purpose for holding the press conference was to influence the potential jurors. He specifically testified that his goal was to "fight back" and counter the fact that the prosecution had "poison[ed] a perspective [sic] juror venire" (J.A. 45). Rule 177, however, contains no exception permitting one side to prejudice the prospective jury simply because he believes the other side has done so. In short, while petitioner claims to have studied and researched Rule 177 the night before his press conference (J.A. 43), even the most cursory reading of the Rule reveals that petitioner was not even close to the line.

CONCLUSION

The judgment of the Nevada Supreme Court should be affirmed.

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APPENDICES

APPENDIX A

Nevada Supreme Court Rule 177

Prior to January 5, 1991, Nevada Supreme Court Rule 177 stated:¹

Trial Publicity.

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

- (a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity

¹ As noted on page 11, *supra*, the Rule was amended on November 7, 1990 (effective January 5, 1991) to add the following language at the beginning of subsection one: "Notwithstanding the provisions of any contrary statute or rule. . . ."

or nature of physical evidence expected to be presented;

- (d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (e) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
- (f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

3. Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

- (a) the general nature of the claim or defense;
- (b) the information contained in a public record;
- (c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
- (d) the scheduling or result of any step in litigation;
- (e) a request for assistance in obtaining evidence and information necessary thereto;
- (f) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(g) in a criminal case:

- (i) the identity, residence, occupation and family status of the accused;
- (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
- (iii) the fact, time and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

APPENDIX B

ABA Model Rules of Professional Conduct, Rule 3.6

RULE 3.6 Trial Publicity.

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence

in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph[s] (a) and (b) (1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

APPENDIX C

ABA Code of Professional Responsibility, DR 7-107

DR 7-107 Trial Publicity.

- (A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
- (1) Information contained in a public record.
 - (2) That the investigation is in progress.
 - (3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
 - (4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
 - (5) A warning to the public of any dangers.
- (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
- (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

- (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
 - (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
 - (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
 - (5) The identity, testimony, or credibility of a prospective witness.
 - (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.
- (C) DR 7-107(B) does not preclude a lawyer during such period from announcing:
- (1) The name, age, residence, occupation, and family status of the accused.
 - (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
 - (3) A request for assistance in obtaining evidence.
 - (4) The identity of the victim of the crime.
 - (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
 - (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
 - (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
 - (8) The nature, substance, or text of the charge.

- (9) Quotations from or references to public records of the court in the case.
 - (10) The scheduling or result of any step in the judicial proceedings.
 - (11) That the accused denies the charges made against him.
- (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote or refer without comment to public records of the court in the case.
- (E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.
- (F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.
- (G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or refer-

ence to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

- (1) Evidence regarding the occurrence or transaction involved.
 - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
 - (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
 - (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
 - (5) Any other matter reasonably likely to interfere with a fair trial of the action.
- (H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
- (1) Evidence regarding the occurrence or transaction involved.
 - (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
 - (3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
 - (4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
 - (5) Any other matter reasonably likely to interfere with a fair hearing.

- (I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.
- (J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

APPENDIX D

State Trial Publicity Provisions Governing Attorneys

<u>State</u>	<u>Provision and Year of Adoption</u>
Alabama	Alabama Rules of Professional Conduct, Rule 3.6 (1990)
Alaska	Alaska Code of Professional Responsibility D.R. 7-107 (1971)
Arizona	Arizona Rules of Professional Responsibility, E.R. 3.6 (1984)
Arkansas	Arkansas Rules of Professional Conduct, Rule 3.6 (1985)
California	No Trial Publicity Provision
Colorado	Colorado Code of Professional Responsibility, D.R. 7-107 (1970)
Connecticut	Connecticut Rules of Professional Conduct, Rule 3.6 (1986)
Delaware	The Delaware Lawyers' Rules of Professional Conduct, Rule 3.6 (1985)
District of Columbia	Rules of Professional Conduct, Rule 3.6 (1990)
Florida	Florida Rules of Professional Conduct, Rule 4-3.6 (1986)
Georgia	Georgia Code of Professional Responsibility, D.R. 7-107 (1984)
Hawaii	Hawaii Code of Professional Responsibility, D.R. 7-107 (1974)
Idaho	Idaho Rules of Professional Conduct, Rule 3.6 (1986)
Illinois	Illinois Supreme Court Rules of Professional Responsibility, Rule 3.6 (1990)
Indiana	Indiana Supreme Court Rules of Professional Conduct, Rule 3.6 (1986)

<u>State</u>	<u>Provision and Year of Adoption</u>
Iowa	Iowa Code of Professional Responsibility for Lawyers, D.R. 7-107 (1971)
Kansas	Kansas Rules of Professional Conduct, Rule 3.6 (1988)
Kentucky	Kentucky Rules of Professional Conduct, Rule 3.6 (1989)
Louisiana	Rules of Professional Conduct of the Louisiana State Bar Association, Rule 3.6 (1986)
Maine	Maine Code of Professional Responsibility, Rule 3.7(j) (1979)
Maryland	The Maryland Lawyers' Rules of Professional Conduct, Rule 3.6 (1986)
Massachusetts	Canons of Ethics and Disciplinary Rules Regarding the Practice of Law, D.R. 7-107 (1972)
Michigan	Michigan Rules of Professional Conduct, Rule 3.6 (1988)
Minnesota	Minnesota Rules of Professional Conduct, Rule 3.6 (1985)
Mississippi	Mississippi Rules of Professional Conduct, Rule 3.6 (1987)
Missouri	Missouri Rules of Professional Conduct, Rule 3.6 (1985)
Montana	Montana Rules of Professional Conduct, Rule 3.6 (1985)
Nebraska	Nebraska Code of Professional Responsibility, D.R. 7-107 (1970)
Nevada	Nevada Rules of Professional Conduct, Supreme Court Rule 177 (1986)
New Hampshire	New Hampshire Rules of Professional Conduct, Rule 3.6 (1986)

<u>State</u>	<u>Provision and Year of Adoption</u>
New Jersey	New Jersey Rules of Professional Conduct, Rule 3.6 (1984)
New Mexico	New Mexico Rules of Professional Conduct, Rule 3.6 (1986)
New York	The Lawyers Code of Professional Responsibility, D.R. 7-107 (1987)
North Carolina	North Carolina Rules of Professional Conduct, Rule 7.7 (1985)
North Dakota	North Dakota Rules of Professional Conduct, Rule 3.6 (1987)
Ohio	Ohio Code of Professional Responsibility, D.R. 7-107 (1970)
Oklahoma	Oklahoma Rules of Professional Conduct, Rule 3.6 (1988)
Oregon	Oregon Code of Professional Responsibility, D.R. 7-107 (1970)
Pennsylvania	Pennsylvania Rules of Professional Conduct, Rule 3.6 (1987)
Rhode Island	Rhode Island Rules of Professional Conduct, Rule 3.6 (1988)
South Carolina	South Carolina Rules of Professional Conduct, Rule 3.6 (1990)
South Dakota	South Dakota Rules of Professional Conduct, Rule 3.6 (1987)
Tennessee	Tennessee Code of Professional Responsibility, D.R. 7-107 (1975)
Texas	Texas Rules of Professional Conduct, Rule 3.07 (1989)
Utah	Utah Rules of Professional Conduct, Rule 3.6 (1987)
Vermont	Vermont Code of Professional Responsibility, D.R. 7-107 (1970)

<u>State</u>	<u>Provision and Year of Adoption</u>
Virginia	Virginia Code of Professional Responsibility, D.R. 7-106 (1987)
Washington	Washington Rules of Professional Conduct, Rule 3.6 (1985)
West Virginia	West Virginia Rules of Professional Conduct, Rule 3.6 (1988)
Wisconsin	Wisconsin Rules of Professional Conduct, Rule 3.6 (1987)
Wyoming	Rules of Professional Conduct for Attorneys at Law, Rule 3.6 (1986)

13
No. 89-1836

Supreme Court, U.S.

E I L E D

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DOMINIC P. GENTILE,
v. *Petitioner*
STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Nevada Supreme Court

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On Writ of Certiorari to the Nevada Supreme Court

REPLY BRIEF OF PETITIONER

INTRODUCTION

Respondent and amicus Solicitor General urge this Court to find, on this record, an irreconcilable conflict between First Amendment free speech and Sixth Amendment fair trial interests. They ask the Court to do here what it has wisely refused to do in the past, "assign priorities as between First Amendment and Sixth Amendment rights, raising one as superior to the other." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).¹

¹ See also, *Bridges v. California*, 314 U.S. 252, 260 (1941) ("For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them").

Respondent and amicus conjure up this constitutional collision by asserting that a special class of speakers—lawyers—are entirely excluded from claiming the same First Amendment rights afforded all other speakers. By contrast, Petitioner asks this Court to follow its prior precedent, and to reconcile the competing constitutional interests, by upholding the traditional idea that less restrictive alternatives to content-based suppression of truthful speech will protect litigants and the justice system from unfair trials. In particular, Petitioner submits that fair trials and free speech by lawyers can co-exist, and the record in this case offers ample, uncontradicted, evidence that this is so.

Moreover, this Court's precedent demonstrates that the way to avoid a collision between free speech rights and fair trial interests lies in application of the working principles developed under the clear and present danger test. Respondent would avoid a careful assessment of the alleged threat to fair trial interests claimed to exist in this case, and would further ask this Court to ignore the traditional judicial practices which can, and did here, ensure both trial fairness and speech rights. To create a constitutional confrontation between the Sixth and First Amendments, the State Bar and amicus ask the Court to find that the judicial use of available less restrictive means of preserving fair trials creates sufficient independent harm to fair trial interests to justify speech suppression. As we spell out below, the justice system provides ample constitutionally permissible devices to hold lawyers to their oaths.

I. ATTORNEY SPEECH AND FAIR TRIALS ARE NOT INCOMPATIBLE.

The record in this case, as acknowledged by the Nevada Supreme Court, establishes that Mr. Gentile's comments caused no actual prejudice to the *Sanders* case. (Cert. App. 4a). Moreover, the Bar presented no direct evidence

of potential prejudice flowing from Mr. Gentile's remarks. Even the American Bar Association, appearing as amicus in support of its Rule, does not contend that the Rule applies to the facts of this case. ABA Amicus Brief, at 2 n.2.

Confronted with the absence of any record basis to sustain a finding of potential prejudice, Respondent attempts to divert this Court's attention by offering a series of inapposite hypotheticals which it claims are the necessary consequence of sustaining the First Amendment interests at stake in this case.² Respondent's "parade of horrors" begins with criticism of this Court's *Nebraska Press* opinion as establishing an unworkable and impossibly stringent standard,³ one which would force burdensome trial management efforts upon courts to protect against even the most egregious examples of attorney speech. Respondent's Brief, at 12. Respondent then portrays Petitioner's arguments as requiring absolute deference to the protection of attorney speech regardless of the consequence to the fair administration of justice. In the process, Respondent rejects any possible compatibility between attorney speech and Sixth Amendment fair

² Respondent also seeks to divert the Court's attention from the specific factual findings made below, in which the Disciplinary Board identified only six statements as ethical violations (JA. 2-3), by arguing that other statements made by Mr. Gentile which were not the subject of discipline also violated various ethical rules. See, e.g., Respondent's Brief, at 2, 36.

³ Contrary to Respondent's expressed concern that the *Nebraska Press* standard is unworkable as applied to counsel, federal courts have issued gag orders on counsel using a clear and present danger test. See, e.g., *Levine v. United States Dist. Court for the Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985). This allegedly unworkable standard has been employed without difficulty by the ABA and by several states. See Standard 8-1.1(a) of ABA Standards Relating to the Administration of Criminal Justice (1978); Respondent's Brief, at 20 n.21 (listing states which have adopted clear and present danger test). Indeed, California has no ethical rule relating to attorney speech on pending litigation.

trial interests. Respondent's error lies not only in its mischaracterization of Petitioner's position but, more fundamentally, in a misapprehension of this Court's teaching.

Where the State seeks to suppress presumptively protected speech, it must establish both that the practice in question furthers a substantial government interest and that the proposed limitations on speech are no greater than necessary to protect the identified governmental interest. *See Wayte v. United States*, 470 U.S. 598 (1985); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Procunier v. Martinez*, 416 U.S. 396 (1974). The first step in this analysis is for the State to define the countervailing interest it seeks to protect, and to establish its importance *vis a vis* speech rights.

Here, despite the repeated references in the briefs of Respondent and the Solicitor General to the State's interest in a fair trial, their argument reveals that the interest they seek to protect is not that of a fair trial, but rather a more general interest in limiting speech by attorneys. For example, the Solicitor General contends that speech about pending litigation by a non-lawyer is fully protected by the First Amendment, and suggests that defendants can make the same statements uttered here either directly or through non-lawyer spokespersons. Solicitor General's Amicus Brief, at 7. The Solicitor General suggests that while non-lawyers may freely disseminate information prejudicial to fair interests, the same information cannot be uttered by lawyers. *Id.* at 25. The Solicitor General even asserts that the prosecution cannot be held accountable for speech by its agents, including the police. *Id.* at 23 n.15. Respondent would also accept other potential sources of comment on the judicial process, arguing that the press and non-participants in the trial process are afforded full First Amendment protection. Respondent's Brief, at 21.

Such selective prohibition of speech prejudicial of fair trial interests is incompatible not only with the justice system's need to preserve fair trials but also with the State's obligation to provide them. Hence, the willingness of the Solicitor General and Respondent to authorize prejudicial speech by non-lawyers demonstrates that the State is not seeking to further fair trials, but rather its generic interest in regulating attorneys. As against this narrow State interest,⁴ the First Amendment takes precedence.⁵

⁴ The nature of this interest has not been clearly articulated by Respondent. Even the ABA, which similarly contends that trial fairness is not the only interest justifying its Rule, *see* ABA Amicus Brief, at 7, fails to clarify what this interest is. This Court has held that the suppression of attorney speech to foster "professionalism" cannot withstand First Amendment scrutiny. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). *Cf. Virginia Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 770 (1976) (legislature may not suppress informative pharmacist speech in order to protect reputation of profession).

⁵ Indeed substantial doubt exists whether the Solicitor General believes that the rules of ethics it seeks to enforce here would apply to prosecutors. The Solicitor argues that a lawyer's license, presumably including that of prosecutors, carries with it ethical obligations that limit speech, and offers as an example the ethical prohibition on communications with persons represented by counsel. *See* Solicitor General's Amicus Brief, at 17, citing ABA Model Rule 4.2. Assistant Attorney General Robert S. Mueller, who is a signatory to the Solicitor's brief, has taken a contrary position in other pending federal litigation. In *United States v. Lopez*, Cr. 89-0687 (N.D. Cal.), Mr. Mueller filed a "Brief Of The Criminal Division Of The Department Of Justice" on February 11, 1991 in which he argued that this very ethical rule did not apply to federal prosecutors due to the Supremacy Clause and also because the separation of powers doctrine limits the ability of federal courts to impose ethical rules on federal prosecutors. Respondent distances itself from this public position of the Attorney General when it argues that "it seems highly likely that the state bar's ethical provisions will be recognized as binding on federal prosecutors, as a matter of federal common law." Respondent's Brief at n.33, p. 34.

Respondent also fails to demonstrate that the means chosen to vindicate this asserted State interest, here the discipline of Petitioner, is no greater an infringement on speech rights than is necessary to protect the State's interest. Petitioner fully agrees with the contention of the Solicitor General that lawyers have a duty not to make comments prejudicial to a fair trial. Solicitor General's Amicus Brief, at 7. Here, no such prejudicial comments were made. The narrower issue this case presents is what the State Bar must show to punish speech that does *not* prejudice fair trial rights.

Lacking evidence of actual or potential prejudice in the record, Respondent and its amici turn to extreme hypothetical cases to argue that lawyers can cause prejudice. For example, Respondent expresses concern about lawyer commentary on inadmissible evidence, and the Solicitor General worries that the First Amendment will be used to justify breaches of a lawyer's duty to maintain client confidences or to violate the ethical prohibition on contacting represented parties.⁶ The concerns are real, but the proposed response is wrong, especially under the circumstances of this case, where none of these concerns are present.

Certainly, publication of inadmissible material, as the police did in the *Sanders* case with the public announcement of lie detector and drug test results, is a significant step closer to a serious threat of prejudice, and in appropriate circumstances may constitute a clear and present danger to fair trial interests. No such speech was made by Petitioner here. Similarly, the First Amendment should offer no defense for the breach of a lawyer's duty to maintain client confidences any more than it shields a lawyer who discloses national security secrets or third party privacy matters that are the subject of a protective order. See *Seattle Times Co. v. Rhinehart*, 467

⁶ But see footnote 5, *supra*.

U.S. 20 (1984); *Alderman v. United States*, 394 U.S. 165 (1969).⁷ Again, no such breach of these duties is alleged here.

Petitioner does not suggest that the First Amendment relieves attorneys of their duties to their clients or to the court. Petitioner parts company with Respondent, however, when it contends that the Sixth Amendment eliminates the free speech rights of attorneys without proof of actual prejudice or even a serious and imminent threat to fair trial interests.

Respondent's "parade of horrors" assumes that trial judges are powerless to protect themselves with anything but burdensome curative measures which would delay the trial until an impartial jury could be selected. Respondent's Brief, at 23-24. Respondent has miscast our argument as requiring such absurd results. We have conceded the authority of the trial court to utilize case management techniques, including practices ranging from *voir dire* to gag orders and contempt findings, to maintain the fair administration of justice. All parties agree that trial judges can, upon a proper showing, issue precise and specific orders to protect the fairness of trials or the privacy interests of affected parties. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Alderman v. United States*, 394 U.S. 165, 181-85 (1969). In addi-

⁷ A lawyer's agreement to preserve client confidences is a contract-based limitation on speech premised on a relationship of professional employment which can be enforced by contract or tort action. Some commentators have argued that, in limited circumstances, the First Amendment does protect an attorney's disclosure of client confidences from ethical prohibitions. See *Zacharias, Rethinking Confidentiality II: Is Confidentiality Constitutional?* 75 Iowa L. Rev. 601 (1990). Obviously, the Court is not called upon to resolve this issue in this case. Similarly, any *ex parte* contact of a sitting juror by an attorney does not seek to inform the public and carries a high risk of prejudicing jurors; it can be prohibited by a gag order or by Rule, see ABA Model Rule 3.5, and it merits punishment under an actual prejudice or clear and present danger test.

tion, trial lawyers, no strangers to the doctrine of waiver, will not create prejudicial publicity in the vain hope that a court will be sympathetic to a request to cure a problem of the lawyer's making.⁸

Finally, if an inflammatory press conference is held by the prosecution or defense on eve of trial, it may result in swift and certain punishment by contempt either because it violates a gag order or because it constitutes misconduct. In this electronic age, the evidence of such misconduct would be near at hand, and it would readily be used to sustain a finding of a clear and present danger to the proceedings.

Indeed this case provides a cogent example of how Respondent has overstated the problem, and trivialized the available remedies that do not infringe the right of free speech. Neither the state prosecutor nor the trial court raised any claim of prejudice in the *Sanders* case. Hence, those with the greatest interest in identifying actual or potential prejudice from Mr. Gentile's remarks claimed none. The trial court simply engaged in traditional voir dire, which it employed with no adverse effect on trial fairness or efficiency. Faced with a record barren of any prejudice, Respondent substitutes for such evidence the speculation that the timing of Mr. Gentile's comments renders them especially likely to prejudice prospective jurors. This argument also lacks merit.

Mr. Gentile's comments occurred on the day of his client's arraignment, the same day that Mr. Gentile learned of the scheduling of a trial date some six months in the future. Respondent, and the Nevada Supreme Court, have inferred from the timing of Petitioner's statements that it was chosen to maximize the potential prejudice because of alleged increased public attention to the case at the time of arraignment. To the contrary,

⁸ See also, Petitioner's Brief, at 39 (describing tactical reasons why defense attorneys are reluctant to speak about pending matters).

and as the record bears out, Mr. Gentile's comments were timed to have the least possible impact on fair trial interests.

As Mr. Gentile testified below,⁹ after researching the issue, he relied on this Court's prior precedent sustaining the fairness of a capital trial because six weeks was a sufficient time to dissipate any potential prejudice from the prosecution's public disclosure of the defendant's incriminating confession. See *Stroble v. California*, 343 U.S. 181 (1952). Here, Mr. Gentile knew that the trial would take place at least six months after the date of arraignment, a far more substantial period of time for the dissipation of any potential prejudice. Moreover, the press accounts of the *Sanders* case bear out this assessment: most of the media attention is clustered around either the early police disclosures or the *Sanders* trial. See J.A. 84-134. Mr. Gentile's comments were made when trial was not imminent. Accordingly, Mr. Gentile's remarks were appropriately timed not to pose a risk of potential prejudice.

II. RESPONDENT HAS FAILED TO JUSTIFY A SPECIAL STATUS FOR ATTORNEY SPEECH.

Lacking proof of prejudice from Mr. Gentile's comments, the State Bar and the Solicitor General offers a more general argument that attorneys enjoy unique credibility with the public, and argue therefore that attorney speech always represents a special danger of causing prejudice in all circumstances. Of course, they offer no empirical or other evidence to support this conclusion. Nor has the State Bar or supporting amici responded to the uniform conclusion of researchers, as cited in Petitioner's opening brief,¹⁰ that the general risk of juror prejudice from all extrajudicial speech, including attor-

⁹ J.A. 59-60.

¹⁰ Petitioner's Brief, at 29-30.

ney speech, is negligible. Before an attorney can be believed he must be heard, and the *voir dire* in this case, as well as the available research, indicate that there is no substantial risk of prospective juror exposure to lawyer speech.

Respondent posits that the public attaches greater credibility to attorney speech than that of all other speakers. The hard reality is to the contrary. See L. Friedman, *A History of American Law* 303-05 (2d ed. 1985) (detailing low esteem in which lawyers held by American public beginning in colonial period).¹¹

Wholly apart from the issue of lawyer credibility generally, the public is equally if not more likely to discount the speech of lawyers as that of a partisan advocate of a client.¹² This public reaction is especially likely when an attorney is an advocate against the amassed institutional credibility of the State and its agents.

Most significant for constitutional purposes, the posited "special impact" of lawyer speech upon the public is completely conjectural, and is not supported either by the record in this case or by any supporting empirical study.¹³

¹¹ See also, Curtin, "Killing" All the Lawyers, ABA Journal 8 (September 1990) (describing low public image of lawyers); Zunker, *Public Perception of the Legal Profession*, Texas Bar Journal 78 (January 1985) (lawyers will never win popularity contest because every lawsuit has a loser, and delays inherent in judicial process; lawyers "need to recognize and accept certain realities about . . . how the public perceives us.")

¹² See Friedman, *supra*, at 304. ("At various points in history, the lawyer has been labeled a Tory, parasite, userer, land speculator, corrupter of the legislature, note shaver, panderer to corporations, tool of the trusts, shyster, ambulance chaser, and loan shark. Some of his bad odor is due to his role as hired hand. The rich and powerful need lawyers and have the money to hire them.")

¹³ This brand of speculation is similar to that rejected in *In re Sawyer*, 360 U.S. 622 (1959), where the government sought to justify attorney discipline by arguing that attorney claims of

In fact, neither the drafters of ABA Model Rule 3.6, nor the ABA's Amicus Brief, mention lawyer credibility as a reason for the suppression of lawyer speech.

In constructing its novel "special status" argument, Respondent attempts to sidestep this Court's precedent applying the clear and present danger test to speech concerning pending litigation by arguing that these cases only dealt with press rights,¹⁴ while the Solicitor General tries to avoid these cases by arguing that they involved only the speech rights of non-participants in the pending litigation.¹⁵ Neither contention is accurate. In addition, Respondent simply ignores this Court's prior holding in *Wood v. Georgia*, 370 U.S. 375 (1962), a case that rejected Respondent's principal argument that a speaker's status as an "officer of the court" eliminates his First Amendment rights.¹⁶

That this Court's free speech precedent protects speech about pending litigation by speakers other than the press is established by several cases. See, e.g., *Bridges v. California*, 314 U.S. 252, 276 (1941) (telegram by union representative to Secretary of Labor about pending union case); *Wood v. Georgia*, (letter from county sheriff to sitting grand jury); *Eaton v. Tulsa*, 415 U.S. 697 (1974) (speech by witness in criminal trial); *In re Little*, 404 U.S. 697 (1974) (speech by defendant in criminal trial).

judicial error cause public doubt about judicial integrity. In the judgment of this Court, "We can indulge in no involved speculation as to petitioner's guilt by reason of the imaginations of others." *Id.* at 635.

¹⁴ Respondent's Brief, at 12-13.

¹⁵ Solicitor General's Brief, at 11 (cases enunciating clear and present danger principle "have all addressed the relationship between the judicial system and outsiders to the system.")

¹⁶ The *Wood* case involved a county sheriff, an acknowledged officer of the court. In *Cammer v. United States*, 350 U.S. 399 (1956), this Court, held that, unlike bailiffs and marshals, lawyers are not "officers" of the court "within the conventional meaning of that term." *Id.* at 405.

In each of these cases, this Court employed the same test that the Court has applied to speech by the press. See, e.g., *Craig v. Harney*, 331 U.S. 367 (1947). Similarly, these cases refute the Solicitor General's contention that this Court has only provided full First Amendment protection to speakers who are not participants in pending litigation. See also Petitioner's Brief, at 16-18 (colonial tradition of lawyer commentary on pending litigation).

Respondent's search for some explanation why this Court should abandon the "working principles" fashioned over the last half century to accommodate both free speech and fair trial interests ultimately comes to rest upon the dissenting and concurring opinion in *In re Sawyer*, 360 U.S. 622 (1959), while ignoring the actual holding of that case.¹⁷

In the *Sawyer* case, an attorney had been disciplined for making a public speech about a pending Smith Act trial in which she was defense counsel. The attorney's comments ranged from criticism of the trial proceedings to challenging the testimony of government witnesses, with a general characterization of the proceeding as shocking and unfair. Five Justices joined in a judgment of the Court holding that the disciplinary authorities did not, as a factual matter, prove that the attorney's comments impugned the integrity of the trial court, the charge for which discipline was imposed. *Id.* at 625. In the words of Justice Brennan, "Speculation cannot take over where the proofs fail." *Id.* at 628. Most significant for this case, the Court held:

Since no obstruction or attempt at obstruction of the trial was charged, and since it is clear that the find-

¹⁷ Respondent chides Petitioner for not citing *Sawyer*. Respondent's Brief, at 14 n.12. In fact, Petitioner cited and quoted from the *Sawyer* opinion in the petition for certiorari and correctly noted that the Court declined to rule upon the constitutional issue raised in this case. Pet. at 6 n.1.

ing upon which the suspension rests is not supportable by the evidence adduced, *we have no occasion to consider the applicability of Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); or *Craig v. Harney*, 331 U.S. 367 (1947), which have been extensively discussed in the briefs. We do not reach or intimate any conclusion on the constitutional issues presented.

Id. at 626-27 (emphasis added; parallel citations omitted).

Accordingly, the *Sawyer* opinion did *not* resolve the constitutional issue raised here, although the Court did acknowledge that it reviewed the facts under the same vigorous standard of review applicable to First Amendment claims.¹⁸ More important, the *Sawyer* opinion identified the very cases Petitioner has previously cited as relevant to this case—*Bridges*, *Pennekamp*, and *Craig*—as pertinent authority for the resolution of this reserved constitutional issue.

To claim that five Justices in *Sawyer* voted for its view of the law, Respondent stitches Justice Stewart's concurrence together with the opinions of four dissenters. This argument evaporates when one reads Justice Stewart's words: he began with a justified encomium to lawyer's ethics, and he then noted that a professional obligation to keep client confidences could not be overcome by a claim of free speech. While we agree, this statement does not support Respondent's broad view. Finally, Justice Stewart noted, as had the plurality, that the case would be different if it involved an "attempt to obstruct or prejudice the due administration of justice." Because that

¹⁸ 360 U.S. at 640. The Respondent attempts to conceal the significance of the *Sawyer* opinion's plenary review by suggesting that the Court's searching factual review was prompted by the territorial jurisdiction of the Hawaii courts, not by the Court's constitutional precedent. Compare Respondent's Brief, at 13 n.11 with *Sawyer*, 360 U.S. at 640.

case did not, as the present case does not, Justice Stewart declined to join what he termed the "dissenting opinion."

III. THE RULE IS BOTH VAGUE AND OVERBROAD.

The briefs of the State Bar and amici serve to strengthen Petitioner's contention that Rule 177 is both vague and overbroad. None of the responding briefs offers any reconciliation between the categories of speech proscribed in Rule 177(2) and the simultaneous protection offered such speech in Rule 177(3). Nor has Respondent or amici attempted to explain what is meant by Rule 177(3)'s authorization of otherwise prohibited speech as long as it is "without elaboration." As Petitioner explained in his testimony below, one section of the Rule appears to prohibit precisely what the other section approves. (J.A. 59). Unfortunately, in determining the proper limits of his speech, Petitioner could not, as have Respondent and supporting amici, simply ignore the apparent ambiguities in the Rule.¹⁹

¹⁹ The ABA's amicus brief has disclosed a more basic ambiguity in the standard applied in this case. The ABA's brief asserts, without citation, that the "substantial likelihood" of prejudice test of Rule 177(1) is different from, and less speech protective than, the clear and present danger test. ABA Amicus Brief, at 12. *Accord*, Respondent's Brief, at 27 n.26. The drafters of Model Rule 3.6, however, indicated that they chose this standard because it was equivalent to the clear and present danger standard. ABA, Alternate Draft of Model Rules of Professional Conduct 275 (1981) (language of what would become Rule 3.6 "incorporates a standard approximating clear and present danger" test and requires a "serious and imminent threat" of prejudice, citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978); *Wood v. Georgia*, 370 U.S. 375 (1962); *Bridges v. California*, 314 U.S. 252, 273 (1941)). The Solicitor General has also previously asserted that the "substantial likelihood" test of Model Rule 3.6 was equivalent to a clear and present danger test. Pet. Amicus Brief of Solicitor General, at 10. When the authors and supporters of a Rule cannot agree on its meaning, it can hardly be considered pellucid. This persistent uncertainty as to what, precisely, is the standard articulated in Rule

In addition, Respondent offers *no* response to Petitioner's overbreadth challenge²⁰ other than to deny that Petitioner has challenged the Rule on overbreadth grounds, and to assert that the categories of speech identified in the Rule are sufficiently narrow. Respondent's Brief, at 31-32. The Solicitor General, in turn, denies that the Rule prohibits categories of speech. Solicitor General's Amicus Brief, at 28. Neither offer any suggestion as to how Petitioner's speech violated the Rule other than to repeat that it fell within one of the proscribed categories of speech.

Finally, Respondent suggests that the Rule is not overbroad because its broad language will not be literally enforced.²¹ Respondent and amici strive mightily to offer narrow, if contradictory,²² interpretations of the Rule. For example, the applicability of Rule 177(2)'s prohibitions to bench trials are justified solely because they will rarely be invoked.²³ The extensive breadth of the Rule cannot be justified by giving unbridled discretion to its enforcers to pick and choose the targets of its enforcement. The attorney discipline in this case teaches that lesson.

177(1), both underscores its vagueness and offers yet another reason not to depart from the longstanding working principles of the clear and present danger test.

²⁰ See Petitioner's Brief, at 48-49.

²¹ See, e.g., Respondent's Brief, at 31 n.31, 32 n.32.

²² For example, Respondent argues that intent is not an element of an ethical violation, while the Solicitor General believes it is. Compare Respondent's Brief, at 32 n.32 with Solicitor General's Brief, at 7, 29 n.16.

²³ Respondent's Brief, at 32 n.32; Solicitor General's Brief, at 28 n.16. But see *Hirshkop v. Snead*, 594 F.2d 356, 371-72 (4th Cir. 1979) (en banc) (disciplinary rule prohibiting extrajudicial attorney speech in bench trials unconstitutional after *Pennekamp*).

CONCLUSION

For the foregoing reasons, the judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE, PETITIONER

v.

STATE BAR OF NEVADA

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEVADA**

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

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QUESTION PRESENTED

Whether Nevada Supreme Court Rule 177, which restricts extrajudicial attorney statements concerning pending litigation, violates the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1836

DOMINIC P. GENTILE, PETITIONER

v.

STATE BAR OF NEVADA

*ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEVADA*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

INTEREST OF THE UNITED STATES

This case involves the constitutionality of an ethical rule that restricts an attorney's public comments about pending litigation in which he is involved. The United States has an interest in ensuring that criminal trials are free from the taint of prejudicial comments by the attorneys involved, and therefore has an interest in the constitutionality of ethical rules such as the one at issue in this case.

STATEMENT

1. Petitioner, a criminal defense attorney in Las Vegas, Nevada, represented a client indicted on state charges of grand larceny, drug trafficking, and racketeering. In response to adverse publicity about his

client, petitioner held a press conference, attended by the electronic and print media, the day after his client was indicted. At the press conference, petitioner vouched for his client's innocence;¹ said that his client was a "scapegoat," Pet. App. 8a; attacked the credibility of potential prosecution witnesses, calling them drug dealers and money launderers;² and accused a police detective, who he knew would be a prosecution witness, of being a drug abuser and the likely perpetrator of the crime.³

The trial of petitioner's client took place approximately six months later. Petitioner's client was acquitted on all charges.

2. On December 6, 1988, the State Bar of Nevada filed a one-count complaint against petitioner alleging a violation of Nevada Supreme Court Rule 177. R. 8-9. That provision is identical to ABA Model Rule of Professional Conduct 3.6, and regulates an

¹ Petitioner stated (Pet. App. 12a):

I know I represent an innocent man, Allen.

The last time I had a conference with you, was with a client and I let him talk to you and I told you that the case would be dismissed and it was. Okay?

I don't take cheap shots like this. I represent an innocent guy. All right?

² Petitioner stated (Pet. App. 8a):

Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers.

³ Petitioner stated (Pet. App. 8a):

There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' checks than any other living human being.

attorney's extrajudicial statements on pending litigation. Rule 177 is divided into three sections. Section 1 provides that an attorney shall not make comments he knows or reasonably should know will have a "substantial likelihood of materially prejudicing an adjudicative proceeding." Section 2 advises the attorney that a comment "ordinarily is likely" to have that effect when it relates to, *inter alia*, the credibility of potential witnesses and the attorney's opinion as to the guilt or innocence of the accused. Section 3 says that certain statements are permissible even if they "ordinarily [are] likely" to materially prejudice an adjudicative proceeding or have a "substantial likelihood" of so doing.⁴

⁴ Rule 177 provides:

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to * * * a criminal matter * * * and the statement relates to:
 - (a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness * * *.
 - * * *
 - (d) any opinion as to the guilt or innocence of a defendant * * * in a criminal case * * *;
 - * * *
3. Notwithstanding subsection 1 and 2 (a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
 - (a) the general nature of the claim or defense;
 - * * *
 - (c) that an investigation of the matter is in progress, including the general scope of the investigation,

Following a hearing, the Southern Nevada Disciplinary Board of the State Bar of Nevada found that petitioner had violated Rule 177 and recommended that he be privately reprimanded. The Board found that petitioner knew the detective he accused of perpetrating the crime and abusing drugs would be a witness for the prosecution. R. 18. It also found that petitioner believed others whom petitioner characterized as money launderers and drug dealers would be called as prosecution witnesses. *Ibid.* In light of the contents, the setting, and the timing of petitioner's statements to the media, the Board concluded that petitioner knew or should have known that those statements would have a "substantial likelihood of materially prejudicing" the fairness of his client's trial. R. 20.

3. Petitioner appealed to the Nevada Supreme Court, which affirmed the Board's decision. Pet. App. 2a-5a. The court found by "[c]lear and convincing evidence" that petitioner "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." *Id.* at 3a. The court noted that the case was "highly publicized"; that the press conference, held the day after the indictment and the same day as the arraignment, was "timed to have maximum impact"; and that petitioner's comments improperly "related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses." *Id.* at 4a. Although the

the offense or claim of defense involved and, except when prohibited by law, the identity of the persons involved * * *.

court found that the comments caused "no actual prejudice in this case," it concluded that the "absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice." *Ibid.* The court rejected petitioner's contentions that his comments were permitted by Section 3 of Rule 177, and that the Rule violated his right to free speech under the federal and Nevada constitutions. Pet. App. 4a.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.). For that reason, this Court has condemned "trial by newspaper," see *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Bridges v. California*, 314 U.S. 252, 271 (1941), and has called for "steps * * * that will protect [court] processes from prejudicial outside interferences. * * * Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." *Sheppard*, 384 U.S. at 363. In accordance with that suggestion, the American Bar Association and a number of state bars have adopted disciplinary rules designed to restrict statements to the press by attorneys involved in pending cases.⁵ Those rules are not unconstitutional.

⁵ Disciplinary Rule 7-107 of the ABA's Model Code of Professional Responsibility, which contained a prohibition against extrajudicial commentary about pending cases, was adopted

1. The right of ordinary citizens to publish lawfully obtained information relating to a pending proceeding may be curtailed only if publication of the information presents a "clear and present danger" to the fairness of a defendant's trial. See, e.g., *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-106 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837-845 (1978); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310-312 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-570 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487-497 (1975). Different considerations apply, however, when it is a lawyer in the case who is the source of the information.

The lawyer stands on different First Amendment ground than a layman or a reporter. "[L]awyers must operate * * * as assistants to the court in search of a just solution to disputes." *Cohen v. Hurley*, 366 U.S. 117, 124 (1961); see *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (lawyers' services "are essential to the primary governmental function of administering justice"); *In re Sawyer*, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting) ("[A] lawyer actively participating in a trial * * * is not merely a person and not even merely a lawyer, * * * [but] an intimate and trusted and essential part of the machinery of justice."). A lawyer's license to practice law necessarily carries with it obligations to the system of justice—as an "officer of the court"—that are not shared by his

in 1968. In 1983, the ABA promulgated the Model Rules of Professional Conduct; Rule 3.6 of that Code governs extrajudicial attorney commentary. That Rule has been adopted by Nevada and 17 other States without change, and by 7 other States with revisions.

client or by a reporter. One of those obligations is to refrain from making prejudicial public comments about a pending trial. Because of the special duty of lawyers to ensure the fairness of judicial proceedings, the First Amendment permits restrictions on a lawyer's right to comment about a case in which he is participating, when the lawyer's comments are reasonably likely to jeopardize the fairness of the trial.

Under that standard, the restraint on speech imposed by Rule 177 is consistent with the First Amendment rights of attorneys. The Rule applies only when there is a substantial likelihood that the speech in question will materially prejudice the trial. Moreover, the restraint on speech is limited: it applies only to speech that can be expected to have a prejudicial effect; it is neutral as to points of view; and it is limited to postponing the attorney's comments until after the trial. In the meantime, the client, counseled by his lawyer, can speak himself or can retain a spokesman to speak on his behalf; the restraint imposed by Rule 177 applies only to comments by the lawyer himself.

2. Rule 177 is neither vague nor overbroad. The Rule sets forth, in terms that are as specific as the limits of language allow, the rule governing attorney comments on a pending case (Section 1), the kinds of statements that are likely to violate the Rule (Section 2), and the kinds of statements that are permissible (Section 3). If a proposed statement falls close to the line of propriety, there is no reason why the attorney may not seek guidance from the bar association as to whether the statement is permissible. Moreover, the Rule does not subject attorneys to strict liability. A comment on a pending case is sanctionable only if the attorney knows or ought to

know that it is improper. Under these circumstances, attorneys who have familiarized themselves with the ethical rules are likely to have a reasonably clear idea of the kinds of statements that are forbidden, and attorneys are not likely to avoid permissible statements out of fear that those statements will be found to fall within the Rule's prohibitions.

ARGUMENT

I. THE FIRST AMENDMENT PERMITS A STATE TO DISCIPLINE AN ATTORNEY WHO MAKES PUBLIC COMMENTS THAT ARE LIKELY TO PREJUDICE A TRIAL

A. Lawyers Have Historically Been Required To Refrain From Engaging In "Trial By Newspaper"

From the dawn of the legal profession, lawyers have been recognized to be "officers of the court" who owe allegiance to the system in which they play an integral part. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 379 (1867) ("Attorneys * * * are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature."); *Ex parte Cole*, 6 F. Cas. 35 (C.C.D. Iowa 1879) (No. 2,973) (attorney is officer of court over whom court "possess[es] an inherent power to control"); *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470, 162 N.E. 487, 489 (1928) (Cardozo, J.) (a lawyer is "an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice"); 4 W. Blackstone, *Commentaries on the Laws of England* 26 (Tucker ed. 1803, 1969 reprint) (attorneys "are in all points officers of the * * * courts * * * and as they have many privileges

on account of their [position], so they are peculiarly subject to the censure * * * of the judges").⁶

For more than a century the legal profession has recognized that lawyers' obligations to the court and to the system of justice justify restricting their extrajudicial commentary about pending cases. The first official code of legal ethics promulgated in this country, the Alabama Code of 1887, warned attorneys to "Avoid Newspaper Discussion of Legal Matters," and stated that "[n]ewspaper publications by an attorney as to the merits of pending or anticipated litigation * * * tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice." H. Drinker, *Legal Ethics* 23, 356 (1953). That provision was quickly adopted by 10 other States, and became the basis for Canon 20 of the American Bar Association's Canons of Ethics, promulgated in 1908.⁷ See 31 Report of the Ameri-

⁶ *Cammer v. United States*, 350 U.S. 399 (1956), is not to the contrary. That case held that lawyers are not "officers" of a court for purposes of the federal contempt statute, 18 U.S.C. 401(2), which authorizes a court to punish "its officers" for misbehavior "in their official transactions." The term "officers" in that statute was construed to refer only to court officials, and not to include "officers of the court" such as attorneys, who are not employed by the court but have ethical duties with respect to court functions.

⁷ Canon 20 stated:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should

can Bar Ass'n 696-697 (1907). By 1914, 31 state bar associations had adopted the ABA Canons. H. Drinker, *supra*, at 25. Thus, from the time the organized legal profession began to police its own ethics, the type of behavior in which petitioner engaged was widely regarded as a proper subject of prohibition.

B. A Lawyer's License To Practice Law Carries With It Reasonable Restrictions Related To Serving The System Of Justice, Including Restrictions On Speech Reasonably Likely To Jeopardize A Fair Trial

Lawyers are licensed by States to play important roles in the administration of justice. In granting a license to practice law, States typically impose restrictions on the lawyer's conduct relating to the exercise of the functions the State has licensed him to perform. Where those restrictions are reasonably related to the proper performance of the lawyer's licensed functions, they are not unconstitutional infringements on the lawyer's personal freedoms. The State "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses, * * * [and] * * * traditionally ha[s] exercised extensive control over the professional conduct of attorneys." *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982). That control is vital not only to ensure fair trials, but also to preserve public confidence in the workings of the justice system, "part of the very foundation of

not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

our constitutional democracy." *Cox v. Louisiana*, 379 U.S. 559, 562 (1965).

The restriction on extrajudicial comments regarding pending litigation is a reasonable condition on the State's extension of the privilege of practicing law. Courts have recognized that "restricting the extrajudicial statements of criminal defense attorneys relates to the government's substantial interest in preserving the proper administration of justice and the basic integrity of the judicial process." *In re Hinds*, 90 N.J. 604, 615, 449 A.2d 483, 489 (1982). As the court stated in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), "public justice is no less important than an accused's right to a fair trial." See *Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979) (en banc).

Although a newspaper is ordinarily free to publish any information it lawfully obtains about a pending judicial proceeding, the cases enunciating that rule have all addressed the relationship between the judicial system and outsiders to that system.⁸ With

⁸ See *Bridges v. California*, 314 U.S. 252 (1941) (contempt charge against newspaper for criticism of court's handling of case); *Pennekamp v. Florida*, 328 U.S. 331 (1946) (same); *Craig v. Harney*, 331 U.S. 367 (1947) (same); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (newspaper convicted for publishing name of judge under ethics investigation); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (press has right to report rape victim's name); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (press has right to publish information learned at criminal trial); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (press has right of access to criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (press has right of access to testimony of minor victims of sexual of-

respect to inside information, the press has no right of access to speech that an attorney is unwilling or unauthorized to share. See *Landmark Communications*, 435 U.S. at 845 (holding that newspaper could publish lawfully obtained, albeit secret, information, but recommending "careful internal procedures" to prevent disclosure of such information in the future); *Sheppard*, 384 U.S. at 363 (courts have obligation to "prevent prejudice at its inception"). Nor does the attorney's client have the right to require his attorney to speak or otherwise represent him in ways forbidden by the code of ethics. See *Nix v. Whiteside*, 475 U.S. 157, 174-175 (1986). Because of the lawyer's special status as a licensed officer of the court, the rules that allow a lawyer's client or the press to comment publicly on a pending trial do not authorize the lawyer to speak for his client in the same manner.

Restrictions on an attorney's extrajudicial comments are proper even in the absence of a "clear and present danger" to the fairness of an adjudicatory

fenses); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (press has right of access to jury selection); *Waller v. Georgia*, 467 U.S. 39 (1984) (press has right of access to suppression hearings); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (press has right of access to preliminary hearings).

The only case that even arguably involved a non-third-party was *Wood v. Georgia*, 370 U.S. 375 (1962), where a county sheriff was held in contempt for publicly criticizing instructions given by a judge to a grand jury. Although the sheriff was technically an "officer of the court" by virtue of his position, the Court determined that his statements were made in his capacity as a private citizen, with no connection to his official duties. *Id.* at 393. The same cannot be said about petitioner, whose statement was made in the course of and in furtherance of his role as defense counsel.

proceeding in which the attorney is involved. The argument that a lawyer is just like any other member of the public ignores the special impact that a lawyer's extrajudicial comments about a case are likely to have. The lawyer's special role in the case—which he enjoys because of his state-conferred license—make him more likely to be believed. By the same token, it is the attorney's special status that can make his inflammatory remarks especially inimical to the fairness of the judicial proceedings on which he is commenting.⁹

⁹ A lawyer's extrajudicial commentary on a pending proceeding is on especially weak First Amendment ground when the information he seeks to disseminate was gained through his role as a lawyer. For example, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), held that a newspaper could be prevented from publishing information that it had obtained through pretrial discovery. The newspaper's special access to information led the Court to conclude that "judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." *Id.* at 34.

Snepp v. United States, 444 U.S. 507 (1980), also suggests that special access to information may constitutionally carry with it a limitation on the right to disseminate that information. *Id.* at 509 n.3. Upon joining the Central Intelligence Agency, Snepp promised "not to publish *any* information relating to the Agency without submitting the information for clearance." *Id.* at 511 (emphasis in original). When Snepp violated that obligation, this Court enforced it even though Snepp's book divulged no classified information. The Court reasoned that Snepp could be held to "reasonable restrictions" on the dissemination of information potentially undermining the Agency's activities. *Id.* at 509 n.3, 511. An attorney's status as a member of the bar imposes an analogous ethical duty on him in handling information that comes to him because of his special status, such as information gained in

This Court has recognized the crucial difference between attorney and non-attorney speech. In *In re Sawyer*, 360 U.S. 622 (1959), a lawyer who was actively involved in a pending criminal case was disciplined for making a speech condemning the prosecution of her client. A majority of the Members of this Court agreed that ethical precepts can require attorneys to abstain from what would otherwise be constitutionally protected speech. *Id.* at 646 (Stewart, J., concurring) ("A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards."); *id.* at 668 (Frankfurter, J., dissenting) ("[A] lawyer actively participating in a trial * * * is not merely a person and not even merely a lawyer. * * * Legal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspapers.") (quoting *Bridges v. California*, 314 U.S. 252, 271 (1941)). State regulation of an attorney's comments implicating the fairness of his client's trial is also consistent with this Court's repeated recognition of trial judges' broad latitude to restrain lawyers' statements regarding trials over which they preside:

[O]n several occasions this Court has approved restriction on the communications of trial partic-

plea bargaining, or criminal discovery material. See *Butterworth v. Smith*, 110 S. Ct. 1376, 1383 (1990) (Scalia, J., concurring) (no First Amendment problem with restriction on newspaper reporter's disclosure of grand jury proceedings at which the reporter has testified, because reporter acquired knowledge not "on his own" but "only by virtue of being made a witness").

ipants where necessary to ensure a fair trial for a criminal defendant. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563 (1976); *id.*, at 601 and n. 27 (Brennan, J., concurring in judgment); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310-311 (1977); *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966). "In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104, n. 21 (1981).

Seattle Times Co. v. Rhinehart, 467 U.S. at 33 n.18.

We submit that the proper balance between a lawyer's duty to the justice system and his right to speak freely is struck at the point where there is a reasonable likelihood that his statements will prejudice a pending proceeding in which he is involved. Most courts that have addressed the issue have struck the balance at that point. See, e.g., *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Hughes v. State*, 437 A.2d 559 (Del. 1981); *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982); *Widoff v. Disciplinary Board*, 54 Pa. Commw. 124, 420 A.2d 41 (1980), aff'd, 494 Pa. 129, 430 A.2d 1151 (1981), appeal dismissed, 455 U.S. 914 (1982); *Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn.), cert. denied, 490 U.S. 1107 (1989); *In re Disciplinary Proceeding Against Eisenberg*, 423 N.W.2d 867 (Wis. 1988); cf. *United States v. Tijerina*, 412 F.2d 661, 667 (10th Cir.) (applying "reasonable likelihood" test in reviewing trial court "gag" order), cert. denied, 396 U.S. 990 (1969); *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973) (same); *People v. Dupree*,

88 Misc. 2d 780, 388 N.Y.S.2d 203 (1976) (same).¹⁰ The Department of Justice has also determined that a "reasonable likelihood" of prejudice is the appropriate standard for restricting its own lawyers' commentary. See 28 C.F.R. 50.2(b)(2). Although a lawyer must be a zealous and partisan advocate for his client, he must litigate his cases in courts of law, not in the court of public opinion.

The restraint on extrajudicial commentary is not the only restriction on lawyer speech that the ethical rules impose. Other restrictions serve equally important purposes, and the justice system would be seriously impaired if those restrictions were found to offend the First Amendment. For example, ethical rules forbid a lawyer from disclosing confidential information related to him by his client unless the client consents after consultation. See ABA Model Rule of Professional Conduct 1.6. Under the analysis proposed by petitioner and his *amici*, however, the rule protecting client confidences would appear to violate the First Amendment. Clients often divulge information to their lawyers that relates to matters of public interest. If petitioner's constitu-

¹⁰ A few courts have chosen other balancing points. See *Markfield v. Association of the Bar*, 49 A.D.2d 516, 370 N.Y.S.2d 82 ("clear and present danger" test), appeal dismissed, 337 N.E.2d 612 (N.Y. 1975); *United States v. Garcia*, 456 F. Supp. 1354 (D.P.R. 1978) ("serious and imminent threat" test). The Seventh Circuit has applied a "serious and imminent threat" standard to review both disciplinary rules, see *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 249; *In re Oliver*, 452 F.2d 111, 114 (7th Cir. 1971), and trial court gag orders, see *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970); see also *Levine v. United States Dist. Court for the Central Dist. of California*, 764 F.2d 590, 596-598 (9th Cir. 1985) (applying "serious and imminent threat" test in reviewing trial court "gag" order).

tional analysis is correct, a lawyer would apparently have a First Amendment defense to the imposition of sanctions for revealing those confidences to the press or the public.

There is plainly no constitutional flaw in the rule barring disclosure of such confidences. The proper functioning of the legal process mandates that a lawyer bear the burden of not disclosing client confidences as a condition of being a lawyer.¹¹ To argue that the lawyer may not reveal confidences because of his duty to represent his client begs the question. The lawyer has that duty because of the ethical canons and the nature of his role as a lawyer. Those are the same sources of authority that justify restrictions on other aspects of the lawyer's conduct, such as making extrajudicial comments on pending cases.

The lawyer's license to practice carries with it other First Amendment burdens as well. His freedom of speech and association are limited by a prohibition on direct communication with persons represented by counsel, ABA Model Rule 4.2, and by the duty of candor to the court, ABA Model Rule 3.3, which requires the lawyer to speak even if he would prefer to remain silent and even if speaking would adversely affect his client.¹² And the lawyer's free-

¹¹ The same reasoning would apply to the lawyer who wants to tell the press that his client is guilty. In many cases that would be information of the highest public concern, yet it is absurd to think that the lawyer's First Amendment rights give him the liberty to make such a statement.

¹² This constraint is illustrated in *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429 (1988). In that case, appellate counsel for an indigent defendant believed his client's arguments on appeal were frivolous. He therefore prepared a brief that advanced several arguments for reversal but

dom of association is further limited by his duty to represent indigent defendants when he is appointed to do so. See *Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 287 (1985); H. Drinker, *supra*, at 62 (lawyers have had duty to represent indigents "[f]rom the earliest times"). While these restraints on the freedom of speech and association would raise serious First Amendment concerns if imposed on private parties, there is no question that they can be imposed on lawyers.¹³

Petitioner relies on this Court's cases dealing with advertising by lawyers, arguing that those cases stand for the proposition that lawyers are held to no

then advised the court that those arguments were frivolous. *Id.* at 432. The state court directed counsel to submit, in accordance with state law, "a discussion of why the issue[s] lack[] merit," rather than just a statement that they do. *Id.* at 430, 432. This Court held that the requirement did not violate McCoy's Sixth Amendment right to counsel. The Court determined that the lawyer's ethical duty of candor to the court outweighed the client's interest in litigating his appeal. Although the case did not address the First Amendment, its message is clear: ethical obligations may require attorney speech in certain circumstances, and are not inconsistent with other constitutional guarantees, even where the attorney's speech disadvantages his client.

¹³ The principle that justifies imposing special burdens on an attorney's speech because of the attorney's relationship to cases in which he serves as counsel is analogous to the burden on a public employee's freedom of speech. A public employee is not deprived of his right to speak on matters of public interest, but his free speech rights are qualified in a manner that would not apply to an ordinary citizen. See *Connick v. Myers*, 461 U.S. 138, 150-151 (1983); *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564-567 (1973); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

higher First Amendment standard than others. Pet. Br. 32-33. In fact, however, those cases stand for just the opposite proposition. From *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), to *Peel v. Attorney Registration & Disciplinary Comm'n*, 110 S. Ct. 2281 (1990), this Court has carefully considered the reasonableness of state bar regulations governing solicitations by attorneys. The Court has never suggested that lawyers are entitled to advertise in the same fashion as any other vendor, or even members of any other profession. Instead, in each case the Court has engaged in a balancing process, weighing the State's interest in the regulation of particular conduct against the lawyer's First Amendment interest in the kind of speech that is at issue. Unlike in First Amendment cases involving members of the general public, the interest in free expression by attorneys does not routinely trump the state's interest in regulating the legal profession. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), for example, this Court upheld a ban on in-person solicitation by lawyers, and held that state interests in regulating lawyers "are particularly strong . . . [because] the State bears a special responsibility for maintaining standards among members of the licensed professions." *Id.* at 460. Under the same reasoning, the state interest in regulating lawyers' extrajudicial comments about pending cases is very strong and should be found to outweigh the individual lawyer's interest in unrestricted free expression regarding those cases.

C. The First Amendment Does Not Require The State To Prove Actual Prejudice To An Ongoing Proceeding Before Restricting Attorney Speech

Petitioner's *amici* contend that the First Amendment requires the State to show actual prejudice to a judicial proceeding before an attorney may be disciplined for his extrajudicial comments. That contention is insubstantial. Courts have uniformly held that an attorney may be disciplined for his extrajudicial comments based on the likelihood of prejudice to pending judicial proceedings at the time the comments were made; no court has suggested that actual prejudice must be proved. See *In re Conduct of Lasswell*, 296 Or. 121, 126, 673 P.2d 855, 858 (1983) (the disciplinary rule "deals with purposes and prospective effects, not with completed harm").

If a showing of actual prejudice were required, even manifestly unethical attorney comments having every prospect of prejudicing pending proceedings could not serve as the basis for disciplinary action whenever it turned out—even for wholly fortuitous reasons—that the attorney's misconduct had no effect on the proceedings. For example, a defense attorney who made blatantly improper and prejudicial comments might be immune from punishment merely because the government, for reasons unrelated to the comments, decided to dismiss the charges, whether because the attorney's client subsequently chose to enter a guilty plea, or because the government ultimately obtained a conviction despite the prejudicial publicity engendered by the comments. That arrangement would put attorneys in a preferred First Amendment position compared to their clients, the press, and the general public, for the standard that governs those speakers does not require actual prejudice to be shown. Yet, as we have argued, the

status of lawyers in the legal system subjects them to more, not fewer, restrictions on their right to speak freely regarding cases in which they are serving as counsel.¹⁴

D. The Restrictions On An Attorney's Extrajudicial Public Comments Imposed By Nevada Supreme Court Rule 177 Are Reasonable

For the reasons set forth above, we submit that a State may limit an attorney's comments that pose a "reasonable likelihood" of prejudice to a pending judicial proceeding. It follows *a fortiori* that Nevada Supreme Court Rule 177 is constitutional, for it prohibits only those comments that create a "substantial likelihood" of prejudice—a higher standard than the Constitution requires.

Despite petitioner's protestations to the contrary, Rule 177 is not a categorical or prophylactic ban on speech, and it does not presume prejudice. Section 1 of the Rule—the only Section that states what the attorney "shall not" do—forbids the attorney from making extrajudicial, public comments that he knows

¹⁴ It is no answer that in some instances the potentially prejudicial effect of attorney comments may be cured by a change of venue, by increased attention to jury selection, or by careful jury instructions. At best, those remedies are unhappy alternatives to avoiding the problem in the first place. They are not always successful, and it is not always possible to determine whether they have had the desired effect. Moreover, a change of venue or a greatly expanded jury selection process imposes significant costs on the justice system and may serve the tactical interests of one party. An attorney should not be permitted to impose costs on the system and, perhaps, obtain a tactical advantage by engaging in conduct designed to prejudice the trial, and then justify that conduct by claiming that there are devices that can be used to combat the potential prejudice that the attorney himself has sown.

or should know present a "substantial likelihood of materially prejudicing" the upcoming trial. By its nature, Section 1 requires a case-by-case determination of the possibility of prejudice. Section 2 advises the attorney that certain kinds of comments, such as statements of opinion regarding the credibility of potential witnesses or the guilt or innocence of the accused, are "ordinarily" likely to have a prejudicial effect. That Section, however, does not erect a "presumption" of prejudice, as petitioner claims. Statements of the sort listed in Section 2 are not forbidden as such; those statements are separately specified to provide guidance as to the kinds of statements that pose a particular risk of violating the prohibition in Section 1. Section 3 then provides assurance that certain kinds of statements are permissible even if they "ordinarily [are] likely" to materially prejudice an adjudicative proceeding or have a "substantial likelihood" of so doing. Rather than being rigid and categorical, the Rule endeavors to provide as much guidance as possible within a framework that necessarily requires a case-by-case analysis of the content and context of any challenged statement.

Like the Rule itself, its application by the Nevada Supreme Court was not categorical or conclusory. The court held that petitioner's statements were indeed "substantially likely to prejudice the proceedings." It found that "[t]he case was highly publicized, and the press conference was held the day after the grand jury indictment and the same day as the arraignment—a time when the intensity of public interest in a notorious case is at its peak." Pet. App. 4a. "[T]hese comments were timed to have maximum impact." *Ibid.* As applied, then, the Rule imposed no prophylactic ban on particular cate-

gories of speech; instead, the court carefully analyzed the nature and context of the statements at issue before finding that they violated the Rule.

Petitioner argues that his conduct was justified because it came in response to misconduct by the prosecution. A lawyer, however, is not entitled to exempt himself from ethical obligations merely because he thinks the prosecutor or the police made improper statements about a case. If petitioner believed that the prosecutor committed ethical violations, the proper course of action would have been to enlist bar disciplinary authorities to stop, and to sanction, the prosecutor's behavior.¹⁵ If petitioner had held his press conference before there had been any adverse publicity concerning his client, the prosecutor certainly would not have been authorized to respond in kind.

In assessing the constitutionality of Rule 177, it is important to note that the Rule does not bar attorney speech altogether, but merely restricts that speech during the pretrial period. This Court has held that a State may regulate the timing or method of expression when the regulation is designed to further important state interests and is neutral with respect to viewpoint. In *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), for example, the Court upheld a prohibition on posting political campaign materials on telephone wires and poles on the

¹⁵ As demonstrated by *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971), the Nevada Bar is not hesitant to discipline prosecutors for making prejudicial extrajudicial comments. There is no allegation, however, that the prosecutor in this case violated ethical guidelines; the information to which petitioner claims he was responding was released by the police.

ground that the city's interest in advancing aesthetic values was sufficient to justify the viewpoint-neutral rule. Likewise, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court upheld as a valid "time, place, and manner" restriction a Park Service rule prohibiting sleeping on designated park lands, even though the respondents wished to engage in political protest by sleeping on the designated property.

Like the regulations at issue in those cases, Rule 177 is justified by the State's vital interest in maintaining the integrity of the trial process and by the lawyer's pivotal role in that process. The Rule is not intended to censor or suppress ideas or information of which the State disapproves. It applies equally to all lawyers involved in a case, and it does not single out certain categories of favored or disfavored speech.

Moreover, Rule 177 is narrowly tailored to the purposes it serves; it merely postpones potentially prejudicial comments until after the risk of prejudice has passed. See *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986) (a law that regulates only adult theaters, and not others, is "narrowly tailored" to combat a problem associated solely with those theaters). In general, that period is a short one. In the federal system, the Speedy Trial Act of 1974, 18 U.S.C. 3161(c)(1), requires trial to begin within 70 days of the indictment, and 95 percent of criminal trials begin by that deadline. Administrative Office of the United States Courts, *Report of the Proceedings of the Judicial Conference of the United States* 18 (1988). In state courts, the median time from indictment to sentencing in felony cases is 86 days. J. Goerdts, *Examining Court Delay* 54-55 (1989).

Even during the pretrial period, a lawyer may make any statements that are not proscribed by the Rule. Once trial begins, the lawyer may make opening and closing statements, cross-examine witnesses, and argue motions, all within the hearing of the press, and all of which reveal information. Once the case is over, the lawyer is free to discuss any aspect of the case with whomever he pleases; he is thus free to "translate the work of our courts for an interested public." Pet. Br. 36. Furthermore, the client himself may at any time speak to the press, or may engage a (non-lawyer) spokesman to do so on his behalf. In sum, Rule 177 is reasonable because it is a carefully tailored restriction that seeks to protect the judicial process without restricting the attorney's right to speak where that speech would not pose a serious risk to the integrity of court proceedings.

II. NEVADA SUPREME COURT RULE 177 IS NEITHER VAGUE NOR OVERBROAD

A. The Rule Is Not Vague

A statute or rule may be void for vagueness if it fails to give "fair notice to those to whom [it] is directed." *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950)). Statutes and rules must be capable of being understood and applied by "the ordinary person exercising ordinary common sense." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973).

Petitioner argues that Rule 177 is vague in two respects. First, he contends that Section 2(d), under which it is ordinarily improper for an attorney to offer the press an "opinion as to the guilt or innocence

of a defendant," is contradicted by Section 3(a), which permits attorneys to state "without elaboration * * * the general nature of the claim or defense." Pet. Br. 46. Even if it had merit, however, this claim would not help petitioner, since the Nevada Supreme Court found his comment to fall within Section 2(a) of the Rule, which covers comments on the credibility of witnesses, rather than on the basis of Section 2(d). In any event, an attorney can state the general nature of his client's defense without extolling its merits, arguing the weaknesses of the government's case, and questioning the good faith of the government in bringing it. Nothing in the Rule bars an attorney from stating that his client denies the charges and intends to contest them, which is quite different from vouching for his client's innocence.

Second, petitioner claims that Section 2(a) of the Rule, which states that it is ordinarily improper for an attorney to comment to the press on the credibility of a witness, is inconsistent with Section 3, which permits unelaborated statements on "the general nature of the claim or defense," "information contained in a public record," and "the general scope of [an] investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved." The short answer is that nothing in Section 3(c) can reasonably be construed as authorizing comment on the credibility of witnesses. To be sure, an unelaborated statement of the defense might imply that the government's evidence should not be credited. But that is a far cry from directly attacking the credibility of individual witnesses, which is what the Rule prohibits and what petitioner was found to have done.

Rather than suffering from vagueness, Rule 177 achieves a remarkable level of precision in addressing

an inherently difficult definitional task. The drafters of the Rule made every effort to provide guidance to attorneys not only by stating a rule in Section 1, but also by setting forth the specific categories of statements that would be likely to be sanctionable (in Section 2) and those that may safely be made (in Section 3). Rule 177 did not leave petitioner in doubt as to whether the statements he intended to make at his press conference would violate his ethical obligations. But petitioner went ahead with his remarkable press conference, apparently disregarding the risk that he would be sanctioned as a result.

B. The Rule Is Not Overbroad

Overbreadth doctrine "is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of * * * sanctions by a statute susceptible of application to protected expression.'" *New York v. Ferber*, 458 U.S. 747, 768 (1982) (quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980)). This Court has warned that the doctrine "must be carefully tied to the circumstances in which facial invalidating of a statute is truly warranted," *Ferber*, 458 U.S. at 769, for "[a]pplication of the overbreadth doctrine is * * * strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). As such, "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ferber*, 458 U.S. at 770; *Parker v. Levy*, 417 U.S. 733, 760 (1974).

Petitioner and his amici argue that Rule 177 is overbroad because it applies to civil litigation and

might cover, for example, a public interest lawyer's statement about the nature of a case. That is clearly wrong. The Rule states that a lawyer may discuss "the general nature of the claim," as well as "the information contained in the public record." Thus, a lawyer may discuss the allegations, both factual and legal, of his complaint. Petitioner also argues that the Rule "presumptively prohibit[s]" certain categories of speech and that the Rule is overbroad as a result. Pet. Br. 48. As we note above, however, Rule 177 simply does not ban any category of speech. See pp. 21-22, *supra*.¹⁶

¹⁶ That Rule 177 applies to both jury trials and bench trials does not render it overbroad, since for any statement to be sanctionable it must be substantially likely to prejudice the proceeding. Obviously, it will be much harder to prejudice a bench trial than a jury trial, but that does not mean that statements outrageous enough to prejudice even the hardest judge should be protected.

Petitioner's argument that Nevada Supreme Court Rule 177 applies to non-practicing lawyers, such as attorney-journalists, is mistaken. Rule 177 is identical to ABA Model Rule 3.6, which the Nevada Supreme Court adopted at the same time that it adopted the rest of the ABA Model Rules of Professional Conduct. Within the ABA Model Rules, Rule 3.6 is located in the section entitled "Advocate," which contains those rules regulating the lawyer's conduct in that role. The comment to Rule 3.6, see Nevada Supreme Court Rule 150 (comments to ABA Model Rules guide interpretation of the Nevada Rules), indicates that it is based upon the ABA Model Code, whose Disciplinary Rule 7-107 was "limited in its application to those attorneys participating in the case." American Bar Association Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press at 93 (1968). The predecessor to DR 7-107, ABA Canon 20, was likewise interpreted by its drafters to apply only where the speaker is counsel in a case. See H. Drinker, *supra*, at 296.

[Continued]

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted,

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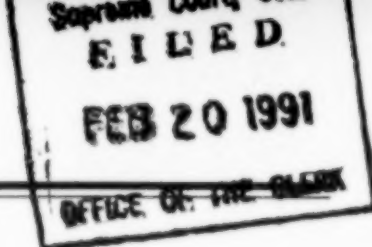
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MARCH 1991

¹⁶ [Continued]

Finally, Rule 177 does not forbid a lawyer's prejudicial comments on pending litigation when made "without intent to prejudice the fairness of trials." Pet. 49. The Rule's only prohibition is contained in Section 1, and that Section forbids comments only if the lawyer "knows or reasonably should know" that they are substantially likely to prejudice the fairness of a trial.



IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DOMINIC P. GENTILE,
Petitioner,
v.
STATE BAR OF NEVADA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
NEVADA SUPREME COURT**

BRIEF OF AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

Amicus, Nevada Attorneys for Criminal Justice, is a non-profit, voluntary association of those individuals, mainly criminal defense attorneys, who have an interest in the fair administration of justice in the country in general, and Nevada in particular. Petitioner Gentile is a founding member of NACJ. Amicus filed briefs opposing the disciplinary charges brought against Mr. Gentile with both the Southern Nevada Disciplinary Board, which originally heard the Petitioner's case, and with the Nevada Supreme Court which issued the final Opinion.

Amicus presents this brief for the Court's consideration because of real concerns that the State of Nevada has embarked upon a course which will end in the complete censorship of citizens who happened to be attorneys. The NACJ believes that it is in the best interest of the public, individual defendants, and the justice system as a whole, that free and full discourse be allowed on matters of great public importance. Such matters would include, at a minimum, the speech at issue here—discussion of police theft of drugs and money and the attempt to convict an innocent man of those police crimes.

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PREFACE

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. *Whitney v. California*, 274 U.S. 357, 375-76, 71 L.Ed. 1095, 1105-06, 47 S.Ct. 641 (1927)(Brandeis, J., concurring)

STATEMENT OF FACTS

Sometime prior to January, 1987, officers with the Las Vegas Metropolitan Police Department (hereinafter "Metro"), as part of a purported narcotics "sting" operation, allegedly stored \$1,000,000 worth of cocaine and \$300,000 in blank travelers checks in a safe deposit box secretly rented by Metro at the Western Vault Corp., a private vault and storage facility owned by one Grady Sanders. On January 31, 1987, Metro discovered that the cocaine and travelers checks had been stolen. (See gen., App., Newspaper Articles)¹

Two Metro officers had keys and access to the box. These officers were subsequently "cleared" by their own department of any involvement in the theft from the Western Vault. This public announcement of the officers' non-involvement came after the officers took, and purportedly passed, a polygraph examination conducted by Ray Slaughter, a local private detective and polygraph expert. No public explanation was provided as to why the officers were not required to submit to a polygraph examination conducted by Metro experts. After clearing the officers of any involvement in the theft of cocaine and checks, the polygraph operator, Ray Slaughter, was himself arrested by the FBI on charges stemming from the sale of cocaine. (See, gen. App., Newspaper Articles)

On February 5, 1988, Mr. Sanders was indicted on eleven counts charging grand larceny, trafficking in controlled substances, and racketeering, all of which generally alleged that Mr. Sanders was responsible for the theft of Metro's drugs and traveller's checks. Petitioner was retained to represent Mr. Sanders against those serious charges. Mr. Gentile held a press conference on February 5, 1988 and generally stated that his client was innocent and that the guilty party was most likely one of the police officers who had a key to the storage box. At that time, trial was scheduled for six months in the future. (App., Nevada Supreme Court Opinion, pg. 2)

¹At the time this brief was finalized, the Appendix agreed upon by the parties had not been received from the printers and Amicus did not have access to indexing for that Appendix. Therefore, references in this brief will be to specific documents in the Appendix and page numbers within the particular document where appropriate.

guilty party was most likely one of the police officers who had a key to the storage box. At that time, trial was scheduled for six months in the future. (App., Nevada Supreme Court Opinion, pg. 2)

After a jury trial, Mr. Sanders was found innocent of all charges. In fact, the jury foreman subsequently stated that the jury felt that the individual who actually stole the drugs and money from the vault was one of the Metro officers who had had a key to the storage box. (App., Transcript of State Bar Proceedings, pg. 74:3-10) After the jury found that Mr. Sanders was not the person who had taken Metro's cocaine and checks, disciplinary charges were initiated by the State Bar against Mr. Sanders' attorney, Petitioner Gentile, at the request of Nevada Supreme Court Justice Cliff Young (App., Letter from J. Young). The State Bar Complaint alleged that Mr. Gentile had violated the provisions of Supreme Court Rule 177. Appellant was charged with making statements at the February 5, 1988 press conference regarding the Sanders case which "were of a nature which he knew, or reasonably should have known, would have a substantial likelihood of materially prejudicing the adjudicative proceedings in the case of the State of Nevada v. Grady Sanders." (App., Complaint, pg. 9:1- 11)

The State Bar's evidentiary presentation at the hearing on the disciplinary charges consisted solely of four exhibits: the complaint, a videotape of the press conference, and two letters from Mr. Gentile. No witnesses were called by the Bar. No evidence was presented concerning the effect Mr. Gentile's statements had on the trial itself. The Bar apparently relied on the presumption of misconduct established by Rule 177(2). (App., Designation Of Witnesses And Summary Of Evidence) Based upon those four exhibits, the Southern Nevada Disciplinary Board found that Mr. Gentile's statements violated the strictures of Rule 177 and recommended that Mr. Gentile be issued a private reprimand. (App., Findings and Recommendation, pg. 4) As to the constitutional issues presented by Mr. Gentile, the Board stated, *in toto*, that "SCR 177 does not violate either the United States or the Nevada Constitutions". (Id. at 4:9-10)

The Nevada Supreme Court upheld the State Bar's decision. The Supreme Court recognized that "the evidence demonstrates that there

was no actual prejudice in this case" (App., Nevada Supreme Court Opinion, pg. 3-4). However, the Supreme Court held that:

The fact that these comments were timed to have maximum impact and related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses establishes by clear and convincing evidence the substantial likelihood of material prejudice to the adjudication of the accused's criminal proceedings. *Id.* at 4.

The Nevada Supreme Court, as did the Disciplinary Bar, gave brief attention to the constitutional issues presented by the Petitioner and this Amicus. "We also reject appellant's constitutional challenges as lacking merit under either federal or Nevada constitutions." (Id., pg. 4.)

ARGUMENT

I. THE STATE BAR'S APPLICATION OF RULE 177 TO THE SPEECH AT ISSUE VIOLATES MULTIPLE GUARANTEES PROSCRIBED BY THE UNITED STATES CONSTITUTION.

The Nevada Supreme Court has adopted, with certain amendments, the ABA's Model Rules of Professional Conduct ("Model Rules"). Included in the ABA's Model Rules is Rule 3.6 which pertains to Trial Publicity. Rule 3.6 was adopted verbatim and became Rule 177 of the Nevada Rules of Professional Conduct.

There are at least four (4) major ethical guidelines adopted nationwide that purport to control the type of statements that can be made by counsel during the pendency of a criminal case: (1) ABA Code in DR 7-107; (2) Model Rule 3.6; (3) ABA Standards for Criminal Justice; and (4) ATLA Code. The restrictions each of these four attempt to make on the exercise of free speech by defense counsel is substantially different. Criminal Defense Ethics, Chapter 10, pgs. 10-1-8.

The ABA Code is the most restrictive and flatly prohibits various sorts of statements from being made during litigation. The Model Rules, which, as set forth above, have been adopted by the Nevada Supreme Court, create a supposedly rebuttable presumption that certain pretrial statements create "a substantial likelihood of materially prejudicing an adjudicative proceeding." The ABA Standards of Criminal Justice, Fair Trial and Free Press Standards prohibit only those extrajudicial statements which "pose a clear and present danger to the fairness of the trial". The ATLA Code goes the farthest in protecting First Amendment rights and concludes that no extrajudicial statements made by criminal defense counsel should ever be viewed as ethically impermissible.

Amicus asserts that Rule 177 is unconstitutional on numerous grounds. Furthermore, even assuming the constitutionality of Rule 177, Amicus asserts that the Bar failed to prove by clear and convincing evidence that the Appellant's communications presented a clear and present danger to the administration of justice.

A. PETITIONER'S RIGHT TO COMMENT ON MATTERS OF GREAT PUBLIC IMPORTANCE WAS VIOLATED BY THE APPLICATION OF RULE 177.

Rule 177 prohibits an attorney from making extrajudicial statements that the attorney would expect to be disseminated by the press if "the lawyer knows or reasonably should know that [the extrajudicial statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding." (Emphasis added) The Rule further sets up a rebuttable presumption that certain enumerated statements "ordinarily" will materially prejudice a case. The Rule makes no distinction between speech which involves political or public integrity implications and that which merely involves the merits of the particular litigation. Amicus asserts that the application of Rule 177 to the Petitioner's speech violates Mr. Gentile's freedom of speech for the reasons set forth below.

1. THE SUBJECT SPEECH DID NOT PRESENT A CLEAR AND PRESENT DANGER TO THE SUBSEQUENT TRIAL.

Freedom of speech has always been the most cherished of rights guaranteed under the Bill of Rights. The First Amendment is not only first in number but first in importance, for from the rights secured by that Amendment, all other rights flow and are protected. The Fourteenth Amendment guarantees that the rights prescribed by the First Amendment will be enjoyed by all citizens of this Nation. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500-501, 72 S.Ct. 777, 779—80, 96 L.Ed. 1098 (1952).

The First Amendment, and the Freedom of Speech Clause contained therein, has always been considered "indispensable to the discovery and spread of political truth," *Whitney v. California*, 247 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Furthermore, this Court has repeatedly emphasized that the First Amendment "embraces at least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thronhill v. Alabama*, 310

U.S. 88, 101-102, 60 S.Ct. 736, 85 L.Ed. 1093 (1940).

Beginning with *Bridges v. California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194, 86 L.Ed. 192 (1941), this Court has demonstrated a preference for free expression and a requirement that any interference with that expression be based on a real and substantial danger to judicial functions. In *Bridges*, the Court addressed the constitutional ability of courts to punish comment and criticisms concerning litigation pending before those courts. This Court stressed that the substantive evils presented must be "extremely serious and the degree of imminence extremely high before utterances can be punished." 314 U.S. 263, 62 S.Ct. 194.

The Court, in *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946), again faced questions concerning the propriety of a contempt citation against the press for comments printed concerning pending litigation. The Court reasoned that regardless of the phrase used to describe the analytical process utilized, e.g., "clear and present", "grave and substantial", "real and substantial", the decision as to whether a particular comment may be sanctioned depended on the balance between the importance of the communications and the State's interest in the fair administration of justice. 328 U.S. 336, 66 S.Ct. 1032.

The Court in *Pennekamp* recognized the important function free speech concerning judicial affairs plays in our democratic system. "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct." 328 U.S. 346, 66 S.Ct. 1037. In cases where there is a question as to where the balance tips, free speech should prevail. 328 U.S. 347, 66 S.Ct. 1037.

Similarly, the Court in *Craig v. Harney*, 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed. 1546 (1947) reversed a contempt citation issued against the press for comments published concerning a pending forcible detainer case. The Court noted that in *Bridges* and *Pennekamp*, a finding of a clear and present danger to the administration of justice had been required in order to sanction presumably free speech. 331 U.S. 372-73, 67 S.Ct. 1253. The Court reversed the contempt citation and held that despite the vehemence of the subject editorials, there was no

real danger presented that the editorials would affect the trial judge's handling of the litigation.

The restrictive holdings in *Bridges*, *Pennekamp*, and *Craig* were repeated again in *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962), which addressed the propriety of a contempt citation issued against an elected sheriff based upon the sheriff's publication and deliverance to a grand jury of statements criticizing the focus of the grand jury's investigation. The question was whether the sheriff's communications threatened the fair administration of justice. 370 U.S. 376, 82 S.Ct. 572. The Court reversed the contempt citation and reaffirmed the appropriateness of the "clear and present danger" test in determining whether contempt for out-of-court statements concerning pending litigation is constitutionally permissible.

In *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), the trial court had issued a gag order prohibiting the press from reporting on certain matters until a jury was impaneled. This Court reversed the restrictions on pretrial publicity. The Court found instructive prior cases pertaining to alleged violations of the sixth Amendment guarantee of trial by an impartial jury. Initially, the Court noted that "[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right." 427 U.S. 551, 96 S.Ct. 2799. The lesson that was gleaned from the Sixth Amendment cases reviewed was that even massive, negative pretrial publicity does not necessarily lead to an unfair trial. "Taken together, these cases demonstrate that pretrial publicity— even pervasive, adverse publicity— does not inevitably lead to an unfair trial." 427 U.S. 552, 96 S.Ct. 2800.

The Court emphasized that what was critical in avoiding any prejudicial impact on the trial was the "measures a judge takes or fails to take to mitigate the effects of pretrial publicity". 427 U.S. 555, 96 S.Ct. 2801.

The Court found that First Amendment prior restraint cases were also relevant. After reviewing the holdings in *Near v. Minnesota ex rel.*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), *Organization for a Better Austin v. Reefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971), and *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140,

29 L.Ed.2d 822 (1971), the Court noted that the main consideration in those cases was protection of the rights afforded by the First Amendment. "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." 417 U.S. 560, 96 S.Ct. 2803.

In reversing the gag order the Court noted that there were other, less constitutionally intrusive, methods available to ensure a fair trial. Tools such as a change in venue, postponement of the trial, searching voir dire, and emphatic jury instruction are all available to avoid actual prejudice at trial. 427 U.S. 564, 96 S.Ct. 2805.

Subsequently, this Court explained in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844-845, 98 S.Ct. 1535, 1544, 56 L.Ed.2d 1 (1978) that in free speech cases the "working principle" that has emerged is that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Id.* at 435 U.S. 843, 98 S.Ct. 1544, quoting from *Bridges v. California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194, 86 L.Ed. 192 (1941). As stated in *Craig v. Harney*, *supra*, 331 U.S. 376, 67 S.Ct. 1255, and quoted with approval in *Landmark*, 435 U.S. 843, 98 S.Ct. 1544, the substantive danger sought to be avoided "must not be remote or even probable; it must immediately imperil."

In *Landmark*, the Court indicated its belief that the "clear-and-present-danger test" espoused by Mr. Justice Holmes was never intended to establish a technical and static test. See, *Pennekamp*, 328 U.S. 351-52, 66 S.Ct. 1040. (Frankfurter, concurring) The Court indicated that the purpose behind the phrase was to allow "a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Id.* at 435 U.S. 843, 98 S.Ct. 1543.

The case that is often cited for support of the proposition that a lawyer's comments on pending litigation may be constitutionally prohibited is *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Reliance is placed upon the dicta found in the closing page of that case in which the Court opined that "[c]ollaboration

between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures," 384 U.S. 363, 96 S.Ct. 1522.

The dicta first stated in *Sheppard*, and repeated to a degree in *Nebraska Press*, 427 U.S. 565, 96 S.Ct. 2805, is contradicted by the unbroken line of cases from this Court indicating the preeminent consideration that should be given to First Amendment rights. The commentary has noted that the cited dicta went far beyond what was at issue in *Sheppard*.

Significantly, the references in *Sheppard v. Maxwell* to gagging the defendant and defense counsel went far beyond the appropriate scope of that opinion. The issue posed in *Sheppard* arose out of the "deluge" of "inherently prejudicial publicity which saturated the community", thereby depriving the defendant of due process. There was no suggestion that the defendant, Dr. Sheppard, or his lawyer created publicity that prejudiced the prosecution....

Not only *Sheppard* but every other Supreme Court decision cited in the opinions in *Nebraska Press Association* involved publicity, often extremely severe, that was prejudicial to the accused, yet the Supreme Court upheld every conviction. Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum, 29 Stan.L.R. 607, 610-11 (1977).

Despite the dicta in *Sheppard*, it seems clear that the doctrine established by this court in First Amendment cases is that a pending court case must actually be threatened, and that threat must outweigh the importance of the subject speech, before a lawyer may be punished for making pretrial communications. Rule 177, on the other hand, only requires a showing of "substantial likelihood" of prejudice to court proceedings in order to sanction an attorney for pretrial communications. It establishes a presumption of violation should one of the enumerated types of comment be made by an attorney. The Rule fails to make any inquiry into of the nature and importance of the particular communications sought to be sanctioned. As such, Amicus asserts that

Rule 177 does not comport with the doctrine refined by this Court in the cases cited above and referred to by the short-hand phrase of "clear and present danger test".

When speech is restricted because of its content, the regulation must be closely scrutinized to insure that the message is not being prohibited "merely because public officials disapprove of the speaker's views. *Niemotko v. Maryland*, 340 U.S. 268, 282, 71 S.Ct. 325, 333, 95 L.Ed. 267 (1951) (Frankfurter, J., concurring). Of paramount importance under the First Amendment is the protection of speech which pertains to public officials and governmental actions. *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966); *Bridges*, 314 U.S. 252, 289, 62 S.Ct. 190, 206; *Landmark*, 435 U.S. 829, 838-39, 98 S.Ct. 1535, 1541. Even in cases pertaining to commercial attorney speech, this Court has held the speech can only be prohibited where the State asserts a substantial interest and the interference with the speech is in proportion to the interest served. In *Re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982).

This is not a case that can merely be decided on the reasonableness of "time, place, or manner restrictions". The prohibitions enacted by Rule 177 clearly impose restrictions on what the attorney says, on the content of the speech. As this Court has explained, where the content of the message is restricted, "governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' " *Consol. Edison Co. v. Public Service Com'n*, 447 U.S. 530, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980).

Here, the subject of the Mr. Gentile's speech was a matter of great public concern. It involved the question of whether police officers had stolen drugs and checks worth in excess of one million dollars and were trying to convict an innocent man of their own crime. Mr. Gentile's statements were brief— he generally denied his client's guilt and asserted that the more likely perpetrator was one of the police officers who had access to the safety deposit box. Trial was six months away and Mr. Gentile did not repeat his meeting with the press.

The State Bar did not present any evidence that would support the

The State Bar did not present any evidence that would support the conclusion that Mr. Gentile's statements threatened the fairness of the subsequent trial. All the Bar proved is what was conceded— Mr. Gentile made statements to the press. The Bar relied solely on the presumption contained in Rule 177 to supply the linkage between the statements made and danger to the trial.

Mr. Gentile, on the other hand, presented testimony indicating that there had been no problems associated with choosing a jury. None of the jurors knew him or knew anything of the statements he had made to the press. Furthermore, Mr. Gentile presented testimony to the effect that his statements could not have affected the fairness of the trial since the public does not absorb and remember such brief flashes of news. (App., Transcript of Disciplinary Hearing, pg. 107:12-23)

Amicus asserts that Rule 177 is facially invalid since it seeks to suppress speech without a finding that the communications threaten a substantial and imminent danger to the administration of justice. Secondly, Rule 177 was unconstitutionally applied here since the record is simply devoid of any evidence that Mr. Gentile's statements threatened the eventual trial. The State Bar, and the Nevada Supreme Court, improperly convicted the Petitioner solely based upon the presumption contained in the Rule. As such, the subject disciplinary action must be rescinded.

2. THE PRESUMPTION OF VIOLATION UTILIZED IN RULE 177 IS UNCONSTITUTIONAL IN ALL CIRCUMSTANCES AND UNCONSTITUTIONAL AS APPLIED BELOW.

Amicus asserts that it is improper under First Amendment precepts to presume that a given communication is improper. As the Court has repeatedly emphasized, determination of whether the Government may constitutionally suppress speech, or punish the prior exercise of free speech, depends on a balancing of the interests presented. In the instant context, it is necessary to weigh the importance of Mr. Gentile's communication of his concerns that police officers had stolen the drugs and money, and were trying to convict an innocent man for their own crimes, against any actual danger to a fair trial that might result. No such balancing is required by Rule 177 and none was conducted here—either by the Disciplinary Board or the Nevada Supreme Court.

As demonstrated by a review of the record of the Disciplinary Hearing, no evidence was presented by Bar Counsel concerning the effect Mr. Gentile's comments had, or might have had, on the eventual trial. All the Bar proved was that the statements had been made and that they fit within the categories of prohibited speech under Rule 177. The Nevada Supreme Court specifically found that there had been no actual prejudice to the Sanders' trial because of the comments made by Mr. Gentile. (App., Opinion, pg. 3-4) The Bar relied solely on the presumption contained in Rule 177 as proof that the subject comments had a "substantial likelihood of materially prejudicing an adjudicative proceeding" and applied that presumption as if it were irrebutable.

The fallacy of the presumption that the enumerated communications will in fact interfere with a fair trial is highlighted by the evidence presented by the Petitioner at the Disciplinary Hearing. Janet Frazer Rogers, Esq. testified that a single press conference by an attorney was not likely to be recalled by a prospective witness even if that person saw the press reports. Ms. Rogers testified that there was "no probability, much less a substantial probability" that Mr. Gentile's statements would prejudice the eventual trial. (App., Disciplinary Hearing Transcript, pgs. 107:12-108:6.

Simply put, sanctioning protected speech about police criminal activity, based upon a presumption that such speech will be prejudicial to an important State interest, is without precedent. In all relevant situations, closing trials to the public, gag orders on the press and participants, or communications by attorneys, this Court has always required direct and substantial proof that the core interest of free speech is outweighed by the other interests involved. No such showing was made here.

Amicus asserts that the presumption of violation contained in Rule 177 operates not only to shift the burden of proof to the responding attorney, *cf. In re Rachmiel*, 449 A.2d 505, 511 fn 6 (1982), but that it has evolved in Nevada into a *per se* rule which effectively mandates a disciplinary conviction once it has been determined one of the enumerated classes of comment were made by an attorney during the course of litigation. This *per se* sanctioning has never been approved by this Court in any context pertaining to the inhibition of First Amendment rights.

3. RULE 177 IS OVERBROAD IN THAT IT REACHES SPEECH WHICH DOES NOT THREATEN THE FAIR ADMINISTRATION OF JUSTICE AND IS THEREFORE PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

Rule 177 is overbroad on its face in that it reaches the exercise of free speech concerning public corruption. The Rule is not narrowly tailored to reach only that speech that creates a "clear and present danger" to the fairness of the trial process. Amicus asserts that speech concerning the guilt or innocence of a defendant, as well as speech indicating who may be truly guilty of a crime, cannot be constitutionally presumed to be prejudicial to the trial process and automatically prohibited. This is particularly true when the speech concerns possible criminal acts by public officials. Since Rule 177 does reach this type of constitutionally protected speech, it is void on overbreadth grounds.

The danger presented by overbreadth is that the particular rule will reach speech that is, in fact, protected speech. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Cantwell v. Connecticut*, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940). Here, Rule 177 prohibits all speech within the enumerated categories and presumes that such speech will interfere with the fair administration of justice. The Rule provides no balancing of the importance of the speech versus the impact on trial. As stated by this Court in *N.A.A.C.P. v. Button*, *supra*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

Amicus asserts that in order to avoid overbreadth problems, a valid rule concerning pretrial publicity may only prohibit speech which is either intended to, or actually does, interfere in a substantial manner with the fair administration of justice. The State Bar must present evidence showing that the subsequent trial has been affected. The Bar cannot rely upon a presumption which may or may not be true. Amicus is not aware of any case in which this Court, in First Amendment cases,

has allowed speech to be prohibited or later sanctioned based merely upon a presumption of impropriety rather than actual proof of an improper effect of the speech.

This does not mean that attorneys will feel free to say anything and everything prior to trial with the hope that the speech might influence a prospective juror. Should the trial judge experience difficulty in voir dire, or certainly should a change of venue be required, the attorney would find himself or herself in a very tenuous position. In that circumstance, should the subject speech not be of vital public importance, thereby tipping the balance back to the side of free speech, the State's interest in the administration of justice would certainly justify the imposition of appropriate disciplinary sanctions against the offending attorney.

But in the situation at bar, where no showing was ever made that the subject speech had a real danger of impacting upon the trial, and where the speech involving police criminality was at the core of First Amendment protections, there was no balancing of interests and the Rule reached speech that is protected speech. As this Court has stated, core freedoms may not be abridged "without substantial support in the record of findings of the state court." *In re Primus*, 436 U.S. 412, 434, fn 27, 98 S.Ct. 1893, 1906, 56 L.Ed.2d 417 (1978).

B. RULE 177 IS VAGUE AND THEREBY VIOLATES BOTH THE FIRST AND FIFTH AMENDMENTS.

In the First Amendment context, a disciplinary rule that is vague offends both the attorney's right to due process under the Fifth Amendment and the First Amendment's guaranty of free speech. The Due Process Clause is offended by requiring the accused to defend against a vague law that fails to give notice to a reasonable attorney of what the rule prohibits. The First Amendment is offended by the vagueness which allows the rule to reach speech which is protected. Amicus asserts that both evils are present at bar.

The First Amendment is violated by the fact that the Rule is "susceptible of sweeping and improper application." *N.A.A.C.P. v.*

Button, 371 U.S. 415, 432-33, 83 S.Ct. 328, 338. A statute, or in this case, a disciplinary regulation, which fails to give fair warning to those it purports to control is invalid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Connally v. General Construction Co.* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

The rule must be sufficiently precise so as to give persons of ordinary intelligence fair warning of what is forbidden and to avoid the possibility of arbitrary and biased prosecution. *Grayned v. City of Rockford*, 408 U.S. 104, 108-9, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). This doctrine applies with full force in the context of the First Amendment. *Smith v. California*, 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959). The vagueness doctrine also acts to prevent "and discriminatory enforcement . . . against particular groups deemed to merit [official] displeasure." *Parachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S.Ct. 839, 847, 31 L.Ed.2d 110 (1972)(citation omitted).

Amicus asserts that the internal inconsistencies presented in Rule 177 render the Rule impermissibly vague under the Due Process Clause as well as under the First Amendment. More importantly, the Rule fails to prevent arbitrary prosecution that is based upon biased, political considerations. *Grayned v. City of Rockford*, 408 U.S. 108-9, 92 S.Ct. 2298-99. As the following demonstrates, Rule 177 contains numerous internal inconsistencies.

Subsection 2(d) of Rule 177 seeks to prevent any extrajudicial statement being made by an attorney involved in a case concerning his or her opinion of the guilt or innocence of the defendant. However, this proscription is in direct contradiction with the provisions of Subsection 3(a) which allows the attorney to make general statements dealing with the general nature of the defense, Subsection 3(b) which allows a general statement repeating information contained in a public record, and Subsection 3(c) which allows statements that an investigation is in progress, including the general scope of the investigation, the defense involved, and "the identity of the persons involved".

The internal contradiction is highlighted by the facts before the Court. Petitioner, faced with what he and his client believed to be a police coverup of their own crimes, made the general statement that his

client was innocent and that one of the Metro officers who had keys to the safe deposit box was "most likely responsible for the theft." These statements are, supposedly, in violation of Rule 177(2)(d). They are plainly allowed, however, by the provisions of Rule 177(3)(a), (b), and (c). The statements gave the general nature of the defense (Sanders was innocent). They gave information that was available or would shortly be available in the public record (Sanders' plea of not guilty and pleadings alleging that Metro officers actually stole the valuables). Finally, the statements pertain to the defense investigation of the charges, the general scope of that investigation, and the identity of those the defense actually believes committed the crime (the defense was investigating Metro's involvement in the case and the statement identifies the true perpetrators).

The Appellant also made statements concerning the background of some of the so-called victims who were expected to be witnesses. However, the Appellant carefully tailored those comments to come within the exceptions set forth under subsection (3) and refused to specifically identify any witness by name. (App., Transcript of News Conference, pg. 10:4-15)

It was the Petitioner's opinion, from his review of the Rule 177, that he could make general statements concerning his defense— someone other than Sanders had stolen the drugs and money and some of the State's witnesses were lying— but he could not identify which of the witnesses he was discussing. (App., Transcript of Disciplinary Hearing, pgs. 65-69) Amicus submits that this is not an unreasonable reading of Rule 177.

Although the Nevada Supreme Court rejected "appellant's constitutional challenges" without specific references to any of those challenges, including the vagueness argument (App., Supreme Court Opinion, pg. 4), the Court apparently was not totally unimpressed with the due process concerns expressed. On November 7, 1990, the Nevada Supreme Court amended Rule 177(1) as follows:

1. Notwithstanding the provisions of any contrary statute or rule, a [A] lawyer shall not make any extrajudicial statement that a reasonable person would expect to be disseminated by means of

public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceedings.

The Supreme Court has obviously sought to remove the contradictions between Subsection 2 and the provisions of subsection 3(a) which allows the attorney to make general statements dealing with the general nature of the defense, Subsection 3(b) which allows a general statement repeating information contained in a public record, and Subsection 3(c) which allows statements that an investigation is in progress, including the general scope of the investigation, the defense involved, and "the identity of the persons involved". Amicus suggests that the Nevada Supreme Court's decision to clarify Rule 177 to eliminate any internal contradictions certainly adds support to the assertion that Rule 177, as applied to the Petitioner, was vague and internally contradictory.

Since the Rule failed to adequately apprise an attorney as to what will constitute a violation, the Rule is unconstitutionally vague and in violation of the Due Process Clause. Furthermore, since the Rule failed to narrowly specify the speech to be prohibited, the Rule must also fail on First Amendment grounds.

II. RULE 177 PRESENTS A CLEAR THREAT TO AN ATTORNEY'S RIGHT TO DISCUSS MATTERS PERTAINING TO CORRUPTION AND DISHONESTY OF POLICE AND PUBLIC OFFICIALS AND TO ADEQUATELY REPRESENT HIS OR HER CLIENTS.

The Nevada Supreme Court has essentially held that an attorney forfeits the rights guaranteed under the First Amendment merely because that attorney chooses to practice law. *In re Raggio*, 87 Nev. 369, 372, 487 P.2d 499 (1971). In *Raggio*, the Court explicitly stated its disregard of free speech considerations when the speaker happens to be a member of the bar.

Nor does free speech give a lawyer the right to openly denigrate the court in the eyes of the public. . . . A member of the bar, however, stands in a different position by reason of his oath of office and the standards of conduct which he is sworn to uphold. Conformity with those standards has proven essential to the administration of justice in our courts. Mr. Raggio offended them, and, as recommended by the Board of Governors, we reprimand him therefor. *Id.* 487 P.2d

Amicus asserts that an attorney has an obligation under the sixth Amendment to provide effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Effective assistance of counsel means more than being counsel of record and sitting next to the defendant during trial. The defendant has a right to an attorney who will actively and aggressively pursue a defense. The Sixth Amendment envisions the attorney "playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure the trial is fair." *Id.*, 104 S.Ct. 2063.

The State Bar's application of Rule 177 prevents an attorney from freely and fully protecting a client's interest prior to trial. Here, Petitioner was faced with pervasive, prejudicial publicity leaked mainly from police officials to the effect that his client was guilty of the theft.

To ameliorate somewhat the effect of that publicity, Respondent made the simple statement that his client was innocent and named those he felt were actually guilty. To do anything less would have been a disservice to his client. To prevent the Respondent from making those comments would offend the Sixth Amendment.

Without a doubt, the main source of prejudice to the conduct of criminal trial comes from the release of information to the press, both on and off the record, by agents for the State. See A. Friendly & R. Goldfarb, Crime And Publicity: The Impact Of News On The Administration Of Justice, pg. 247 (1967) ("[A]lmost all the news that plagues trials has originated in disclosures by policemen, wardens, bailiffs, coroners, or even judges. The exceptions are few."). If counsel for the accused is not allowed to attempt even faintly to counter such publicity, with the bare assertion that his client will be found innocent, an assertion that was correct herein, the scales of justice will always be balanced against the defendant.

Indeed, circumstances will virtually never occur in which the right to freedom of speech could be more important to an individual than in the course of criminal proceedings. The prosecutor is privileged to publish to the world—including the defendant's family, friends, neighbors, and business associates—what in most any other context would constitute libel *per se*. The indictment may contain detailed charges of the most serious conduct, and the delay before ultimate vindication may be many months, if not years. In the meantime, entirely apart from the proceedings in court, the good name earned during a lifetime can be demolished. There can be no more pressing occasion, therefore, for immediate, effective, public rebuttal. Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys, 29 Stanford Law Review 607, 613 (1977).

The claim that there is an inherent press bias against the defense was supported by the testimony presented at the hearing below.

A. [Greenspun] Well, there's no question about it. There's an imbalance in most criminal cases.

Q. What is that imbalance and how does it occur?

A. The imbalance is the access to information. Most reporters have a far greater access to the Police Department than they have to defendants. Either defendants are told by their lawyers not to talk or the lawyers aren't talking or they can't get that kind of information from other sources and they turn around to the police. (App., Transcript of Disciplinary Hearing, pg. 106:2-12)

[I]f a lawyer did not do everything he could possibly do to level out the playing field of pretrial publicity, he would be derelict in his responsibility and he would not be doing or upholding his oath that says I will protect my client's rights to the fullest. (App., Transcript of Disciplinary Hearing, pg. 119:3-8).

[Janet Frazer Rogers, Esq.] So what are we going to do? Not cover it? All we can do is read the indictment, read the Information, talk to the police people, policemen, that's all you're going to hear. So I think that [prohibiting comments by defense counsel] doesn't only chill it. I think it produces prejudicial and slanted news coverage. (App., Transcript of Disciplinary Hearing, pg. 187:1-7)

[Edward Kane, Esq.] The second conclusion that I've come to is if you think those statements are in violation of the rule and if you're right, then the rule is absolutely unconstitutional. The rule impedes both an attorney's right to effective assistance of counsel because again if an attorney is to do an effective job defending his client and defending him again means more than just defending him in court. It means defending him outside of court. (App., Transcript of Disciplinary Hearing, pg. 196:23-197:9)

An attorney's obligation and right to provide effective assistance of counsel is violated when the State interferes with counsel's ability to make decisions about how to conduct the defense. See, e.g., *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). An attorney is prevented from providing effective assistance of counsel in cases where there has been pervasive and negative pretrial publicity fostered by the prosecution if that attorney is not allowed to at least

state that his client is not guilty and that the facts will prove that innocence.

The purpose of such speech is not to attempt to influence potential jurors. The purpose is to counter the effect that massive and prejudicial publicity may have on the decisions, sometimes political decisions, as to how a Defendant will be charged, tried, judged, and perhaps sentenced. District attorneys are political creatures. It has sometimes been suggested that judges are not always immune to political pressures. Since the most critical actions in a criminal case occur long before trial, countering a tide of publicity calling for the drawing and quartering of your client is an essential part of a lawyer's role in defending a client in a sensational case.

To unilaterally ban all statements by the defense attorney reflecting the client's innocence, or pointing at those believed to be the true guilty parties, prevents an attorney from protecting his client against prejudicial pretrial publicity. It leaves the defendant without anyone to speak for him. It deprives the attorney of his First Amendment right of free speech. Therefore, as set forth above, unless there is a showing made that such comments will actually prejudice the proceedings, Amicus asserts that a lawyer's right to speak out in defense of the client concerning police misconduct outweighs the marginal concern for the fair administration of justice presented here.

CONCLUSION

For the reasons set forth above, Amicus asserts that Petitioner's First and Fifth Amendment rights were violated by Rule 177. The Rule is unconstitutional on its face and as applied. Affirmance of the Nevada Supreme Court's actions will have a profoundly chilling effect on defense counsel's willingness to respond to the challenge of major criminal trials. Such an effect is hardly warranted given the lack of proof of any real danger to the administration of justice by the exercise of free speech by defense attorneys. Finally, upholding the Nevada Supreme Court's determination that one press conference presents a substantial likelihood of prejudicing an eventual trial may have extremely interesting consequences on fair trial claims under the Sixth Amendment. For all these reasons, Amicus asserts that the instant disciplinary charges should be stricken.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DOMINIC P. GENTILE,
v.
STATE BAR OF NEVADA,
Petitioner,
Respondent.

On Writ Of Certiorari To
The Supreme Court Of The State Of Nevada

BRIEF AMICUS CURIAE OF
AMERICAN NEWSPAPER PUBLISHERS ASSN.
AMERICAN SOCIETY OF NEWSPAPER EDITORS
DONREY, INC.
GANNETT CO., INC.
NATIONAL ASSOCIATION OF BROADCASTERS
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
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QUESTION PRESENTED FOR REVIEW

Whether the First Amendment's speech and press clauses limit the power of a state to punish a lawyer who holds a news conference decrying criminal charges against his client and expressing his views regarding police and prosecutorial conduct, when there were no circumstances to suggest that the conference could interfere with the fair trial rights of the defendant or the administration of justice.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1836

DOMINIC P. GENTILE,

Petitioner,

v.

STATE BAR OF NEVADA,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of The State Of Nevada

BRIEF AMICUS CURIAE OF
AMERICAN NEWSPAPER PUBLISHERS ASSN.
AMERICAN SOCIETY OF NEWSPAPER EDITORS
DONREY, INC.

GANNETT CO., INC.

NATIONAL ASSOCIATION OF BROADCASTERS
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
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THOMSON NEWSPAPERS HOLDINGS INC.
IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

The American Newspaper Publishers Association, The American Society of Newspaper Editors, Donrey, Inc., Gannett Co., Inc., The National Association of Broadcasters (NAB), Radio-Television News Directors Association (RTNDA), The Reporters Committee for Freedom of the Press, The Copley Press, Inc., The New York Times Company, The Society for Professional Journalists, and Thomson Newspapers Holdings Inc., submit this brief *amici curiae* in support of the Petitioner, Dominic P. Gentile. Both parties to this suit have given *amici* written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTERESTS OF THE AMICI

The American Newspaper Publishers Association is a nonprofit trade association representing about 1,400 newspapers. Membership constitutes about 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation, in the United States. ANPA member newspapers always have had an intense interest in providing accurate and balanced reports on matters of public significance, especially those matters concerning our criminal justice system.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 900 people who hold positions as directing editors of daily newspapers throughout the United States. ASNE's Statement of Principles sets forth, among other concepts, "The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them

to make judgments on issues of the time." Further set forth in the Statement of Principles is the following:

Every effort must be made to assure the news content is accurate, free from bias and in context, and that all sides are presented fairly.

Readership surveys have consistently illustrated the public's interest in the operations of the criminal justice system in the United States and, pursuant to the ASNE Statement of Principles, the editor members make every effort to provide balanced coverage of the criminal justice system.

Donrey, Inc., through subsidiary corporations, d/b/a Donrey Media Group, publishes 55 daily newspapers, and owns five cable television companies and one television station. It operates in 20 states.

Within the State of Nevada, Donrey owns and operates the *Review-Journal* in Las Vegas, the *Nevada Appeal* in Carson City, and the *Daily Times* in Ely. Those newspapers have a combined circulation of over 160,000 on a daily basis. Through a joint operating agreement, the *Review-Journal* prints and distributes the *Las Vegas Sun*. The *Review-Journal* and *Las Vegas Sun* have a combined Sunday circulation in excess of 200,000. Donrey's television station, KOLO-TV in Reno, has been consistently ranked No. 1 in its market for news coverage.

A recent readership survey conducted by Belden & Associates for the Las Vegas *Review-Journal* showed that news reports concerning the criminal justice system are of significant interest to its readers. Unnecessary restrictions on comments by attorneys

practicing in Nevada would have a serious, detrimental effect on Donrey's ability to present a full and complete report on those matters to its readers and viewers.

Gannett Co., Inc., a Delaware corporation, publishes 82 daily newspapers, including the *Reno Gazette-Journal* and *USA TODAY*, and a variety of non-daily publications. Gannett also owns 10 television stations and 15 radio stations and operates a national wire service. Gannett's newspapers and broadcast stations routinely report on the workings of the criminal justice system. Unwarranted restriction of the gathering and dissemination of such news inhibits Gannett's ability to inform the public fully.

The National Association of Broadcasters (NAB) is a non-profit incorporated trade association that represents American radio and television broadcasters and the major commercial networks. NAB's members cover, produce and deliver the news to the American people. NAB has a heightened interest in enhancing the ability of its members to provide the American people with complete news coverage of the events in the criminal justice systems of this country.

Radio-Television News Directors Association (RTNDA) is the principal professional organization of journalists—executives, editors, reporters and others—who gather and disseminate news and other information on radio and television in the United States. RTNDA members daily report on criminal trials and other news pertaining to the administration of criminal justice in this country.

Reporters Committee for Freedom of the Press is an unincorporated association of working reporters

and news editors dedicated to protecting the First Amendment and freedom of information interests of the news media. It has provided research, guidance or representation in virtually every major press freedoms case since its founding in 1970.

On an almost daily basis, the Reporters Committee's staff attorneys and fellows assist journalists and their lawyers in solving problems arising from coverage of the criminal justice and criminal judicial systems. Callers frequently seek advice on obtaining criminal justice records under state and federal open records laws, obtaining access to judicial proceedings under the First Amendment, and challenging restrictions on what they may report or what sources, including criminal defense lawyers, may tell them.

The Copley Press, Inc. publishes five daily newspapers in California—*The San Diego Union*, *San Diego Tribune*, *The Daily Breeze*, *The News-Pilot* and *The Outlook*—whose combined circulation exceeds 500,000 copies daily, as well as seven daily newspapers in Illinois, and operates an international news service.

The New York Times Company publishes 33 newspapers, including *The New York Times*, a daily newspaper with national circulation of 1.15 million daily and Sunday circulation of over 1.7 million. The Company also publishes 17 magazines and owns five television and two radio stations. Times Company publications report extensively on the criminal justice system nationwide.

Thomson Newspapers Holdings Inc., a Delaware corporation with headquarters located in Des Plaines, Illinois, publishes 123 daily newspapers and 34 weekly newspapers in the United States. These newspapers

are located in "small-town America," with the largest circulation being 80,000 and the majority of newspapers falling in the 15,000 to 25,000 circulation range. Total daily circulation in the United States within the Thomson group is 2,200,000. The experience of our editors and reporters, based on a very close interaction with their small communities, is that public interest in news about the criminal justice system is consistently among the highest of all the categories of news. In order to properly and accurately satisfy this widespread public interest in the criminal justice system, it is essential that news-gatherers talk to the participants in the system, including police, court officials and attorneys.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Nevada Supreme Court Rule 177, in pertinent part, is set out in the margin below.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case presented in the Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT*

Rule 177 deprives the public of vital information and opinion about the operation and integrity of the criminal justice system. It does this by threatening sanctions against defense attorneys who speak to reporters in order to respond to police and prosecution claims or to give their opinions about the operation of these agencies. The Rule assumes that the mention of certain topics will, *per se*, create an impermissible prejudice, even when public discussion will serve to restore a balance in the pool of information available to citizens. Under the circumstances in this case, no serious and imminent threat is presented to the defendant's right to a fair trial or to the fair administration of justice. The Rule is unconstitutional as written and as enforced and should be overturned.

ARGUMENT

I. RULE 177 DEPRIVES THE PUBLIC OF VITAL INFORMATION AND OPINION REGARDING THE OPERATION AND INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

The considerations in this case should not be confined to Petitioner's First Amendment right of speech. This case is necessarily about the ways that the public, through the news media, can hear about and understand what happens in a criminal case—an interest

* Counsel of Record acknowledges with gratitude the research assistance provided by the head of the Washington and Lee Journalism and Communications Department, Hampden H. Smith, III, by Washington and Lee law student David M. Giles, and by Thomas M. Beck, a law student at the University of Virginia, who worked under the direction of the Thomas Jefferson Center for the Protection of Free Expression

this Court has held to be of fundamental constitutional importance. "Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).¹

The role of explaining how the criminal justice system is handling a particular case falls, for the most part, to the news media. "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring). When this Court recognized

¹ In the context of access to judicial proceedings this Court has long believed that "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *In re Oliver*, 333 U.S. 257, 270-271 (1948). This vital public policy safeguarded by the First Amendment has been emphasized by this Court in a series of cases protecting the publicity of and public access to the criminal justice system. See, e.g., *Richmond Newspapers* (the First Amendment demands that criminal trials be open); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982) (a state statute requiring closure of trials during the testimony of minor victims of sexual offenses violates the First Amendment); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (*Press-Enterprise I*) (guarantee of openness applies to the selection of jurors); *Waller v. Georgia*, 467 U.S. 39 (1984) (guarantee of openness applies to suppression hearings); *Press Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986) (*Press-Enterprise II*) (guarantee of openness applies to preliminary hearings as well).

"a presumption of openness," *Richmond Newspapers*, 448 U.S. at 573, it reaffirmed the principle described 14 years earlier:

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). The principle of an open criminal justice system relies on the assumption that news reporters will actively report on the process and will serve as a surrogate for the public's actual presence at each proceeding. "Instead of acquiring information about trials by first-hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." *Richmond Newspapers*, 448 U.S. at 572-3.

The accuracy and depth of understanding of that news coverage depends on the reporter's ability to attend proceedings, to read the records, and to question the participants, including the lawyers. Some facts of any particular case will be, or should be, available from police, prosecution or court records, but the full meaning of entries or the defense per-

spective may not always be apparent, even to the most practiced courthouse reporter. Attorneys involved in the litigation are able to explain the technical issues inherent in police conduct, prosecutorial decisions, defense choices, and the judicial oversight of the entire area. Swift, *Model Rule 3.6, An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U.L. Rev. 1003, 1013 (1984). "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975).

As this case illustrates, the defense attorney may be the best source of valuable opinions about and criticism of that process. No one can speak more authoritatively about the frailties of the judicial and prosecutorial systems. The freedom to speak up critically is especially important in cases like the present one involving allegations of police misconduct. "The public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny." *Waller v. Georgia*, 467 U.S. at 47. "[C]ommentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern." *Nebraska Press*, 427 U.S. at 606 (Brennan, J., concurring). Genuine advancement of public understanding and effective prompting of the "crucial prophylactic aspects of the administration of justice"² will not come about if reporters' sources are

² *Richmond Newspapers*, 448 U.S. at 571.

silenced by the threat of professional discipline. Speech delayed until the end of a case is tantamount to public oversight delayed until there is little left to oversee.³ See, Freedman & Starwood, *Prior Re-*

³ Especially because of the curative effect of public oversight of the criminal justice system, it is important to consider the public's right to receive the information intended for it. Ironically, the Nevada Supreme Court believed this speech ought to be suppressed precisely because it was delivered at a time when the public was keen to hear it, "a time when the intensity of public interest in a notorious case [was] at its peak." *Gentile v. State Bar of Nevada*, 787 P.2d 386, 387 (Nev. 1990).

This Court has discussed the public's right to receive in a number of other settings. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 759 (1972); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.*

Justice Brennan has explained the reasons to consider the citizen's right to receive information. "First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them." *Board of Education v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (emphasis is the Court's). Secondly, Justice Brennan believed the recipient's meaningful exercise of his own rights depends upon his receiving the speech of others. *Id.* Writing in a dissenting opinion in *Pico*, then Justice Rehnquist agreed with Justice Brennan "that the reciprocal nature of the right to receive information" comes from the recipient's own "rights of speech, press and political freedom." *Id.* at 912-13. He added, however, that he would limit the protection of the right to receive to instances when the sender's right to speak is protected and the denial of access to the information is "relatively complete."

As Petitioner has explained in his brief on the merits, the

straints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum, 29 Stan. L. Rev. 607, 612 (1977). The need for public discussion of a case and the exchange of opinions about its progress cannot be suspended while that case is pending. *Press Enterprise II*, 478 U.S. at 12-13.

In today's high-technology society, the public knows more quickly than ever about the arrests and indictments of criminal defendants. Immediately citizens want to have information that will help them prevent similar crimes from happening to them. Next, they want information designed to catch the criminal, and they want progress reports from the police on the investigation of the crime. They want to see the progress of the prosecution, and eventually, the conviction of the guilty person.⁴

First Amendment does protect his right to speak and when he is disciplined if he speaks, the denial of access is "relatively complete." During the critical time preceding the trial and while the trial is proceeding, the defendant's attorney's speech is sharply curtailed. For the reasons set out herein, this attorney may be the only source of the critical information at the time when the public is paying the most attention. "Some news can be delayed and most commentary can even more readily be delayed without serious injury. . . . But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter." *Nebraska Press*, 427 U.S. at 560.

⁴ In a survey conducted on behalf of the *Las Vegas Review-Journal* by Belden & Associates during May through July of 1988, the survey reported that 55% of the adults responding said that they were "very interested" in Crime and Police News. Even higher percentages reported great interest in "Clark County or Las Vegas News" (75%) and "Local Community or Town Coverage" (69%), topics that may include news of local

The first information demanded is from the government's side and is, necessarily, adverse to the defense.

The charge or indictment presents information tending toward guilt. The knowledge in the community that the police, the committing magistrate, the grand jury and the prosecutor all have concluded that there is adequate evidence of guilt to support an exercise of their judgment adverse to the defendant has an effect upon the community's view of the case.

Swift, *Restraints on Defense Publicity in Criminal Cases*, 64 Utah L. Rev. 45, 77 (1984).

Petitioner's news conference provided a counter to the police statements. It is ironic that the Nevada Supreme Court concluded that his attempt to respond, and to restore balance to the pool of information available to the public, would be substantially likely to create material prejudice to the upcoming trial. The avoidance of "material prejudice" was precisely what prompted Petitioner's difficult decision to proceed with the news conference.

The police investigation leading up to his client's indictment had been the subject of intense public interest and had raised a number of troubling questions. Someone had stolen money and drugs stored by the Las Vegas METRO police squad at a safety vault company owned by Petitioner's client, Grady Sanders. The theft was discovered on the last day of January

crimes. The response "very interested" was the highest degree of interest offered among the survey choices.

1987. Almost immediately, the Sheriff told reporters that employees of the vault company were among the suspects, (*Las Vegas Review-Journal*, February 2, 1987, 1A; *Las Vegas Sun*, February 3, 1987, 1B.), but one newspaper had reported that METRO police officers were suspected of the burglary (*Las Vegas Review-Journal*, February 4, 1987, 8B). Shortly thereafter, it was reported that the FBI had joined the investigation (*Las Vegas Review-Journal*, February 4, 1987, 1B). By mid-February, barely two weeks after the burglary had been discovered, the Sheriff announced that the police officers had been cleared. (*Las Vegas Sun*, February 12, 1987). In March, a police detective filed an affidavit in court swearing that the purpose of the theft was to discredit the local police drug investigation team. (*Las Vegas Review-Journal*, March 12, 1987, 1B). Then, it was reported in June of 1987 that Grady Sanders had been involved in an undercover FBI sting and the suggestion made that Sanders had a "warm relationship" with the FBI as an informant (*Las Vegas Sun*, January 28, 1988, 5B). In a column published on January 7, 1988, in the *Las Vegas Sun*, the writer raised a string of questions about the FBI's arrest of the polygraph operator who tested and "cleared" the local police officers who had been mentioned as suspects in the vault theft. Before Petitioner said so explicitly at his news conference, news stories and columns suggested that Grady Sanders was not the only likely suspect in the burglary and that internecine quarreling between police agencies might have produced the indictment against him. Mr. Sanders' indictment for burglarizing the police safety vault was announced by the police on February 5, 1988 (*Las Vegas Sun*, February 6, 1988, 1A; *Las Vegas Review Journal*, February 7, 1988).

The situation demanded a reply from the defense; certainly reporters looked to the defense for a reply. It is not sufficient to say that the defendant himself could answer reporters' questions. In this case, Grady Sanders had made tentative responses to police activity (*Las Vegas Sun*, undated story, "Burglarized vault firm closes doors"), but many criminal defendants may be intimidated or inarticulate, and may not be able to speak for themselves. *Powell v. Alabama*, 287 U.S. 55, 68-70 (1932). The defendant may not know whether a protest against the system is timely, accurate or likely to be effective. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). It is the most appropriate spokesperson, the defendant's lawyer, whom Rule 177 proposes to silence.

Defense counsel should not be prevented from conveying to the public the essentials of a client's position with respect to an investigation or the filing of charges. There are times when counsel for a controversial defendant can legitimately speak in support of his client's cause by discussing the propriety of the processes by which his client has been charged and is being tried.

Swift, *Restraints on Defense Publicity in Criminal Cases*, *supra*, at 81.

The Petitioner's news conference was held precisely for the purpose of responding to the indictment of his client and to articulate his response to the troubling implications raised by the indictment. At the

very least, protestations of innocence ought to be permitted. Indeed in some cases, citizens may believe that the absence of protest raises the implication of guilt. But in this case, the Petitioner also believed that the government had misused its power.

Certain prosecutions will compel the public's interest and restrictions on publicity about these cases will do nothing to diminish that interest—indeed it will likely fan the interest to greater heights. The best cure for these dilemmas is accurate on-the-record information.⁵ To silence the attorneys involved in a criminal prosecution works against the effort to obtain balanced and accurate information.

II. THE SPEECH OF DEFENSE COUNSEL DID NOT PRESENT A SERIOUS AND IMMINENT THREAT TO THE TRIAL PROCESS

A. No Threat Was Presented To The Defendant's Sixth Amendment Rights To A Fair Trial

If speech about the criminal justice system is to be restrained, the Court's analysis of any prior restraint of protected speech searches for "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable, it must immediately imperil." *Craig v. Harney*, 331 U.S. 367, 376 (1947).⁶ Rule 177 does not permit the ap-

⁵ Without accurate information, rumors will almost surely fill the gap. "The muzzling of responsible sources of information creates a vacuum that will be filled by irresponsible sources." Younger, *Fair Trial Free Press and the Man in the Middle*, 56 A.B.A. J. 127, 128 (1970). Rumors, fed by a void of information, "could well be more damaging than reasonably accurate news accounts." *Nebraska Press*, 427 U.S. at 567.

⁶ Because Petitioner and other amici have addressed the applicable standard, this brief does not.

plication of the proper clear and present danger test. It merely creates a list of presumptions.

Rule 177 (2)⁷ has four subparts that create a presumption that the mention of many topics listed will⁸

-
- ⁷ 1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
 2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to . . . a criminal matter . . . and the statement relates to:
 - a. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
 - . . .
 - c. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
 - d. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that would result in incarceration;
 - e. information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

⁸ Actually the Rule says these topics are "ordinarily . . . likely to have such an effect." Especially after the decision by the Supreme Court of Nevada in this case, the words "ordinarily . . . likely" are turned into a presumption that mention of these topics will create a material prejudice.

create the substantial likelihood of material prejudice. Two of several topics listed are protestations of the defendant's innocence and the credibility of any witness.

Petitioner's speech offended Rule 177 merely because Petitioner's news conference spoke about these topics listed in the subparts of the Rule. When Petitioner mentioned topics on the Rule 177 list, he did so to respond to the police and prosecution, who had already discussed those topics. Petitioner did not create publicity adverse to his client's right to a fair trial. He did not create publicity that would unfairly affect the administration of justice. Because the Rule uses the substantial likelihood standard and couples it with an "all-purpose" list of presumptions, it permits the Supreme Court of Nevada to restrain speech under circumstances that do not present the requisite threat to conduct of the criminal trial.

Nevada Supreme Court Rule 177 and the American Bar Association model rule⁹ from which it is derived, are products of an era of one-sided fixation on publicity adverse to the defense.¹⁰ The literature spawned by the trial of Sam Sheppard almost uniformly failed to consider what should occur when the defendants provided *their* side of the news story. See, e.g., Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 Wm. and Mary L. Rev. 1 (1971); Kaufman, Report to the Judicial Conference

⁹ ABA Model Rules of Professional Conduct Rule 3.6 (1983).

¹⁰ "The original 1968 edition of the Fair Trial and Free Press Standards relied almost entirely on *Sheppard v. Maxwell*." American Bar Association, *Standing Comm. on Association Standards for Criminal Justice, 1986 Report* § 8.4S (1986).

of the United States, *The Free Press-Fair Trial Issue*, 45 F.R.D. 391 (1968); Jaffe, *Trial by Newspaper*, 40 N.Y.U. L. Rev. 504 (1965).

Certainly the courts have recognized the prejudicial danger in attorneys' remarks during some cases, but this Court has concluded: "In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right." *Nebraska Press*, 427 U.S. at 551. Research published within a year after this decision confirmed this judgment with data showing that:

Jurors take their responsibility seriously; they check prejudices at the door of the jury room and recognize their special role as temporary members of the judiciary bound by rules of law and procedures that are foreign to their business transactions or informal conversations. Ordinary citizens are willing to accept these legal trappings and to work within them. The fears voiced by critics that jurors make capricious decisions because of bias, incompetence and irrelevant factors have not been substantiated.

Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 Stan. L. Rev. 515, 520 (1977). A more recent survey of the literature confirmed the same conclusion ten years later. Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 Judicature 162 (1988).

In 1978, the American Bar Association House of Delegates recognized that danger is not present in every criminal case and adopted the "clear and pres-

ent danger" standard in the Fair Trial Free Press Rule 8-1.1 on Extrajudicial Statements.

Indeed, in the vast majority of criminal cases, extrajudicial statements by trial attorneys have no impact at all. The failure to take full account of this consideration is the central weakness of the [earlier trial publicity rules].

American Bar Association, *Fair Trial and Free Press Standards*, Comment to Section 8-1.1 (1978).

More recently, comment [1] to Rule 3.6 of the *District of Columbia Rules of Professional Conduct*, explained why it continues to use the "serious and imminent threat" standard:

It is difficult to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to influence the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. *Often a lawyer involved in the litigation is in the best position to assist in furthering these legitimate objectives.* No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. (Emphasis added.)

Rules of Professional Conduct and Related Comments, D.C. Court of Appeals, Bar Report Supplement, p. 37 (February/March 1990).

At this year's most recent ABA meeting, the House of Delegates adopted several revisions to the Fair Trial Free Press Standard 8-1.1 regarding Extrajudicial Statements. Though the revisions by no means represent an ABA consensus on this issue, the ABA adopted a test which "at least 'approximated' the clear-and-present danger standard," according to the informal remarks provided by the revision committee reporter. Bender, *Report With Recommendations - Fair Trial and Free Press Standards*, ABA Criminal Justice Section, commentary at 10 (1990). Additional action by the House of Delegates acknowledged in a limited fashion that the defendant may reply to the prosecution's statements; it required the prosecution to acknowledge the presumption of innocence, *id.* at 6, and it added new language to acknowledge that the attorney may "educate or inform the public concerning the operations of the criminal justice system," *id.* at 7. Unfortunately the ABA model rule retains the chilling superstructure of the list of inhibited statements. Even so, these changes reflect some recognition that a defense reply to reports from police and prosecution agencies will not bias a fair trial.

Especially when that reply espouses the defendant's position, does so in response to reported events and statements made by the police, and does so six months before a trial is scheduled, there is no realistic danger of the comments creating a threat to the defendant's Sixth Amendment right to a fair trial.

B. The State's Interest In The Fair Administration Of Justice Is Not Threatened By This Speech

When the speech to be restrained is speech from the defendant's mouth or "mouthpiece," as the case may be, "the key conflict is . . . not between a

defendant's sixth amendment rights and a publisher's first amendment rights; the interests advanced to justify suppression of prejudicial news are largely the state's interests in putting guilty criminals in jail and in maintaining confidence in the fairness of the judicial system." Tribe, *American Constitutional Law*, § 12-11, n.3 (1988). At the same time that "[a]n accused has a right to a trial by an impartial jury on evidence which is legally admissible," it is also true that "[t]he public has the right to demand and expect 'fair trials designed to end in just judgments.'" *Mares v. United States*, 383 F.2d 805, 808 (10th Cir. 1967). But the government is not permitted to restrain criticism of its agencies in order to begin a criminal trial in a neutralized vacuum. "A judicial process untainted by prejudice against the prosecution is certainly a worthy goal, but that is not the point so far as the Constitution is concerned." Freedman and Starwood, *supra*, at 612. Thus, the government's interest is limited to "seeing that cases in which it believes a conviction is warranted are tried before [a jury] which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 34, 36 (1965). Even the American Bar Association's standards discussing the prosecutor's role do not insist that government has a constitutional right to convict the accused: "The duty of the prosecutor is to seek justice, not merely to convict." American Bar Association, *Standards for Criminal Justice*, Prosecution Function Standard 3-1.1 (c) (1982).

As discussed above, most of the initiatives on reports to the public regarding a criminal case are in the hands of prosecution and police. It does not threaten the state's interest in the fair administration

of justice to permit defense counsel to respond. "[R]ather than interfering with a fair trial, the right of a defendant to provide information necessary to overcome already existing biases may well be essential to its maintenance." Swift, *Restraints on Defense Publicity in Criminal Cases*, *supra* at 77.

CONCLUSION

When, as here, a fair trial and the fair administration of justice are not impaired, the public's interest in the reporting and receiving of information and opinion about the functioning and integrity of the criminal justice system should prevent the Supreme Court of Nevada from enforcing Rule 177. For the foregoing reasons, *amici curiae* urge this Court to reverse the decision of the Supreme Court of Nevada and to strike down Rule 177 as unconstitutional.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

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STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Nevada Supreme Court

**BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF PETITIONER**

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On Writ of Certiorari to the Nevada Supreme Court

**BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF PETITIONER**

INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 5,000 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in its House of Delegates.

The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the field of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of criminal jus-

tice. Consequently, the NACDL has a vital interest in seeing that the proper balance is struck between the right to a fair trial and the first amendment rights of attorneys, a balance which affects not only litigants and lawyers, but the general public and our system of justice.

This case presents those issues in an unusually straight-forward context with a clear record. For these reasons, NACDL appeared as amicus in the proceedings below and does so before this Court as well.¹

SUMMARY OF ARGUMENT

Criminal defense lawyers, through public discussion of pending criminal cases, frequently present a point of view on official conduct and political and civil liberty issues, that otherwise would not be heard. In addition to advancing the public's first amendment right to information concerning the judicial system, such speech fulfills the attorney's own first amendment rights and the first amendment right of his or her client.

Given the substantial interests affected by professional ethical regulations which restrict defense attorneys speech, such regulations must satisfy a three part narrowly drawn means test to be valid and such regulations can only be justified by the state's interest in insuring a fair trial. This demanding test is especially appropriate when applied to restrictions which might chill defense counsel speech because such attorneys are particularly vulnerable to selective enforcement of such regulations.

When measured against this test and the related considerations, the professional regulation of attorney speech in the present case must be declared invalid.

¹ The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of this Court pursuant to Rule 36.3 of the Rules of this Court.

ARGUMENT

I. PROFESSIONAL ETHICAL REGULATIONS WHICH RESTRICT DEFENSE ATTORNEYS' PUBLIC DISCUSSION OF CRIMINAL CASES JEOPARDIZE SUBSTANTIAL FIRST AMENDMENT INTERESTS OF THE PUBLIC, THE ATTORNEY AND THE DEFENDANT.

Restrictions on trial publicity affect three separate interests: (1) the public's interest in pending criminal trials, by limiting the available flow of information; (2) an attorney's right to engage in politically and socially important speech; and (3) the interest of the accused in associating with the spokesperson of his or her choice.

Such restrictions are especially harmful when applied to lawyers representing criminal defendants because criminal defense lawyers have a special role in advancing the first amendment interests of the public. The lawyer for an accused will frequently represent an unpopular or minority view, or a view critical of public officials or official conduct, for which there may be no other realistic source of information. If the defense attorney is not free to provide the perspective of the minority or less powerful view, that view may never be heard.

A. The Public's Interest In Learning About Pending Criminal Cases Is Of Significant Constitutional Magnitude.

This Court has firmly and consistently established that the operation of the judicial branch of government is emphatically the public's business and that limitations on the transmission of information about matters occurring in the judicial system, especially the criminal justice system, are permissible only under the narrowest of circumstances. The right of contemporaneous public access to information about the judicial system was first recognized in *Bridges v. California*, 314 U.S. 252 (1941), where this Court stated that proscriptions on "utter-

ances made during the pendency of a case . . . produce their restrictive results at the precise time when public interest . . . would naturally be at its height [and are] likely to fall . . . upon the most important topics of discussion." *Id.* at 268. See also, *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) ("Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.")

More recently, in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976), the Court noted the "special protection" granted to the distribution of information about criminal proceedings, and that First Amendment interests "should have particular force as applied to reporting of criminal proceedings." See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

The importance of public access to information about the criminal justice system was once more recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), where Chief Justice Burger stated, "'The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.'" *Id.* at 575-76 (plurality opinion by Burger, C.J., quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)).²

² Interests identified by the Chief Justice as being served by opening the "stock of information" include integrity of the trial, *id.* at 578 (see also, *id.* at 596 (Brennan, J., concurring); *id.* at 600 (Stewart, J., concurring)), public confidence and the appearance of justice, *id.* at 571-72 (see also, *id.* at 594-95 (Brennan, J., concurring)), and the therapeutic value inherent in "providing an outlet for community concern, hostility, and emotion." *Id.* at 571. In furtherance of these goals, this Court has afforded constitutional protection to publication of information gained at open criminal proceedings, *Nebraska Press Association*, *supra*, from public records of the criminal courts, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975), and even from otherwise confidential official investigations. *Landmark Communications*, *supra*.

The public's interest in obtaining a full flow of information about the operation of the criminal justice system, and the conduct of the government officials who populate and direct the system, is advanced in particularly important ways by criminal defense lawyers. Lawyers who represent persons accused of crime frequently represent a perspective on official conduct and political and civil liberties issues that otherwise is unavailable.

For example, criticism of the judiciary, even in the handling of a particular trial, is important to public oversight of the system and is within an attorney's rights and possibly even obligations. *In re Sawyer*, 360 U.S. 622, 629-30, 636 (1959); *id.* at 647 (Stewart, J., concurring); *id.* at 669 (Frankfurter, J., dissenting). Alerting the general public that a prosecution may be motivated by political pressure provides potential jurors with information to assist their understanding of the judicial process and to help them serve their function as a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Similarly, disclosure of events which occur between arrest and trial increases the probability that the police will do their work properly, protecting the rights of both the accused and the public.

The role of defense lawyers in advancing the public's interest in obtaining a full flow of information concerning the legal system extends beyond providing information about the criminal justice process. See also *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 253-254 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (recognizing legitimate functions fulfilled by defense counsel speech). Criminal cases often raise broader public policy issues about the legitimate scope and enforcement of the criminal law. For example, the desirability of jailing officials of companies that pollute the environment is a legitimate matter of general public concern about which defense lawyers can provide a unique perspective. See

"Increasingly, A Prison Term is the Price Paid by Polluters," *New York Times*, February 15, 1991, p. A1. So, too, the issue of abortion, one of the major public issues of our day, is more completely understood when the perspective of the criminal defense bar is included. See "Adultery as a Crime: Old Law Dusted Off in a Wisconsin Can," *New York Times*, April 30, 1990, p. A1.

The recognized right of the public to information about criminal proceedings, and the role of the defense bar in furthering that interest, is significantly affected by ethical proscriptions against attorney speech concerning criminal cases. For example, assurance of the integrity of the proceedings, which can be served through dissemination of information by defense counsel, is undermined by restrictions on defense counsel speech. Most defense attorneys will be reluctant to express criticism of the public justice system, either generally or in a particular case, if the attorney knows that by doing so he or she may well be subject to professional discipline.

The chilling effect of professional regulations limiting attorney speech is especially great for criminal defense lawyers. Criminal defense attorneys often practice alone, or in small firms, and are particularly dependent upon their reputations to meet the constant need for new business. As such, the threat of professional discipline and related sanctions carry significant economic consequences both because of the costs to defend against such charges and the resulting loss of reputation and income if charges are sustained. Further, as the spokesperson for unpopular clients, constantly facing off against public officials, a criminal defense attorney will understandably be concerned about discriminatory enforcement of such regulations. See e.g., *Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137 (E.D. Va. 1976) *aff'd in part and rev'd in part sub nom. Hirschkop v. Snead*, 594 F. 2d 356 (4th Cir. 1979) (en banc) (State Bar admits that the complaints brought against an attorney who regu-

larly represented unpopular clients and causes "were meritless").

While professional regulations thus chill publicly valuable speech by criminal defense lawyers critical of the mainstream view, such regulations seem to have little or no effect on comments by public officials and law enforcement agents. In fact, those participants who assist the press in creating fair trial problems in high publicity cases most often are police officials, prosecutors, and judges. See, *Sheppard v. Maxwell*, 384 U.S. 333, 338, 339, 342 (1966); *Irvin v. Dowd*, 366 U.S. 717, 725-27 (1961); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir.), *cert. denied*, 372 U.S. 987 (1963); *Fouquette v. Bernard*, 198 F.2d 96, 99 (9th Cir. 1952); *Friendly & Goldfarb, Crime and Publicity* 247 (1967); *Gillmor, Free Press and Fair Trial* 43, 92, 95-96, 101, 111-12, 181-83 (1966); Jaffe, *Trial by Newspaper*, 40 N.Y.U. L. Rev. 504, 520 (1965); McCarthy, *Fair Trial and Prejudicial Publicity*, 17 *Hastings L.J.* 79, 96 (1965).

The press of course is free to report the facts of crimes and criminal prosecutions, but the press is not always informed, either through access or training, in a way which makes their reporting meaningful and accurate. See, *Nebraska Press*, *supra*, at 587 n.14 (Brennan, J., concurring). While the press can report the facts, lawyers can interpret their significance. Lawyers can explain confusing technicalities and provide information to the press concerning police conduct, judicial oversight of police activity, prosecutorial decisions, the implication of others in the alleged criminal conduct and action taken concerning them, political and social issues inherent in the litigation, and specific or general deficiencies in the criminal justice system. *Nebraska Press*, *supra*, at 605-06 (Brennan, J., concurring). Because lawyers are knowledgeable insiders their access to this type of information is greater than that of the press or the general public.

Furthermore, defense attorneys employed for the purpose of representing a client's interests have a strong motivation to become particularly knowledgeable about the facts of the case and the applicable law. As a result, defense attorneys are in an especially valuable position to advocate necessary reform and a pending criminal trial provides a unique opportunity to do so. When lawyers make speeches to bar associations only lawyers hear. When lawyers talk to the press about newsworthy matters on which public attention has been focused, the public hears and the value of public access to information about the criminal justice system is served.

B. The Defense Attorney Has Important Personal First Amendment Interests In Discussing Pending Criminal Cases.

Lawyers have a unique role in our society in their interest in the social and political issues of the day, and an attorney's interest in such issues often is the very reason he or she will undertake the defense of an accused. "It is the glory . . . of the bar that . . . would-be tyrants and oppressors of mankind find the elimination of a free and fearless legal profession a necessary first step in the carrying out of their plans." Editorial, "*Let's Kill All the Lawyers!*," 34 J. AM. JUD. SOC'Y 35 (1950). The opportunity to represent a client precisely because the attorney agrees with the political or social views of that client is an associational right necessary to fulfillment of the protective role of the legal profession.

At the same time, a lawyer involved in litigation should not be denied the opportunity to express his or her own views on those same political and social issues. To the extent that such expression overlaps issues presented in the case, however, the existence of professional regulation of the attorney's speech, and the potential for sanctions, present a significant chill. Professional regulation, consequently, may force that attorney to choose between two constitutionally protected methods of advancing his

or her political beliefs. Should the attorney choose to represent the client, the attorney may be forced to forego his or her own right to express political views. Should the attorney choose to speak his or her mind, the attorney may be forced to forego advancement of his or her social and political interests through client representation.

C. The Accused Has Significant First Amendment Interests In Discussion Of The Case By His Attorney.

The accused's right of representation also may be diserved by restrictions on the defense attorney's speech. The criminal defendant, presumed by our law to be innocent, is made to suffer the consequences of an accusation of misconduct by an official entity of the government. The accused's reputation and self-respect can be destroyed; his or her family is made to suffer; the accused is forced to face his fellow citizens wearing a stigma of wrongdoing. Silence may well result in the existence of an anti-defense bias in the community from which the jury will be selected. Other more general biases concerning attitudes toward criminals, racism and social and political values also may exist in the community. Thus, rather than interfering with a fair trial, the right of a defendant to provide information necessary to overcome already existing biases may be essential to its maintenance.

Criminal trials also are expensive. In an increasing number of cases, especially those in which either the crime or the prosecution has political overtones, the defense has found it necessary to request contributions from the public. Garry & Riordan, *Gag Orders: Cui Bono?*, 29 Stan. L. Rev. 575, 581 (1977). Obtaining such a defense fund will depend, to a large extent, on the defendant's ability, with his attorney as spokesperson, to convince potential contributors of his innocence.

An innocent defendant may need to speak out, through his or her attorney, to guard against the miscarriage of justice. The "political" responsibility of the jury to serve as a check upon the judge and prosecutor, as well

as to function as the conscience of the community in ensuring morally and socially appropriate enforcement of the law requires that the jury bring information with it to the trial. A primary source of such information must be the accused.

A criminal defendant, however, often is not articulate or informed and may wish to exercise his right to hire another to advance his interests and adopt as his own "the words used by his more fluent or learned friend on his behalf." Christian, *A Short History of Solicitors* 3 (1896). The client may also be in jail, subject to a substantial limitation on his ability to speak out. Reliance on his attorney may be his only effective means of bringing his plight to the attention of the public.

II. PROFESSIONAL ETHICAL REGULATIONS WHICH INFRINGE THE FOREGOING FIRST AMENDMENT RIGHTS MUST BE SUPPORTED BY A COMPELLING GOVERNMENTAL INTEREST, MUST BE PRECISELY DRAWN, MUST BE EMPIRICALLY DEMONSTRATED TO HAVE A NEXUS TO THE ASSERTED EVIL, AND MUST BE THE LEAST RESTRICTIVE MEANS OF ACCOMPLISHING THE GOVERNMENTAL GOAL.

This Court has established a most stringent constitutional test, "strict scrutiny", as the appropriate standard for evaluating restrictions on public access to information about criminal trials. "Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982). Such a demanding test is particularly appropriate when applied to ethical proscription on attorneys speech, given the important first amendment role filled by defense counsel and their vulnerability to discipline.

The requirement that a restriction on first amendment interests be closely tailored to achieving the compelling

governmental goal implicates three factors. First, it mandates an unusually high degree of precision in draftsmanship. Second, it requires that the means chosen must bear a demonstrable relationship to the furtherance of the asserted goal. Third, there must be no alternative means of achieving the goal which is less restrictive of otherwise protected expression.

A. Regulations Suppressing Discussion Of Pending Criminal Proceedings Must Be Drawn With Narrow Specificity.

The specificity requirement reflects a recognition that there often is a fine line between legitimate and illegitimate speech, and thus mandates that the regulation "will accomplish the pinpointed objective permitted." *Carroll v. President of Princess Anne*, 393 U.S. 175, 183 (1968). A broad regulation may prevent protected speech either by restricting expression which is not harmful, or by chilling expression which is not clearly subject to or excluded from the regulation. See, e.g., *Nebraska Press*, 427 U.S. at 567 (trial court's order restraining pretrial publication of evidence invalidated in part because of the failure of the judge "to predict what information [would] in fact undermine the impartiality of jurors, and [to draft] an order that [would] effectively keep prejudicial information from prospective jurors."); see also *id.* at 571-72 (Powell, J., concurring).

This principle has been applied to professional attorney regulations which implicate First Amendment values. In *NAACP v. Button*, the Court struck down a broadly worded professional regulation, noting that the broad language would cause "[l]awyers [to] understandably hesitate . . . to do what the [statute] purports to allow," and lent itself "to selective enforcement against unpopular causes." 371 U.S. 415, 434, 435 (1963). Similarly, in *In re Primus* a disciplinary rule was struck down because it had a broad sweep and "distinct potential for dampening" protected expression. 436 U.S. 412, 437-38 (1978). Indeed, even regulation of attorney speech proposing

purely commercial transactions may not be broadly worded. *In re R.M.J.*, 455 U.S. 191, 203 (1982). Thus, professional proscriptions on attorney discussion of pending litigation must be precisely worded, providing specific notice of the expression which may be sanctioned.

B. There Must Be An Empirically Demonstrable Nexus Between The Means Used And The End Sought To Be Achieved.

The second prong of the closely tailored means requirement is the necessity that the nexus between the means chosen and the ultimate goal be empirically demonstrable, rather than speculative or conjectural. This requirement is common in trial publicity litigation. In the early contempt cases, the Court examined the record to determine whether the facts supported the conclusion that the integrity of the system was truly threatened. *Wood v. Georgia*, 370 U.S. 375, 387 (1962); *Craig v. Harney*, 331 U.S. 367, 373 (1947); *Pennekamp, supra*, at 335; *Bridges, supra*, at 271; see also *In re Sawyer, supra*, at 628. The publication restraint in *Nebraska Press* was struck down in part because "[the trial judge's] conclusion as to the impact of [the] publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable." 427 U.S. at 563.

The more recent progeny of *Richmond Newspapers* have applied this principle as well. In *Globe Newspaper, supra*, the Court expressed no view as to whether an asserted governmental interest was sufficiently compelling to meet the goal element of the constitutional test, but made clear that the test could not be satisfied where the connection between the means and the ends was speculative. 457 U.S. at 607. Again in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), although the goals were accepted as compelling, a nexus between those goals and the information limitation was not established "by findings showing that an open proceeding *in fact* threatened those interests." *Id.* at 510-11 (emphasis added). Thus, the Court held that restrictions on the

first amendment right of the public to learn about a criminal trial must be supported not only by a compelling interest but also by a demonstration that interest is truly at risk.

C. Restrictions On Speech About Pending Criminal Cases Are Invalid If A Less Restrict Alternative Is Available.

The access restrictions at issue in *Globe Newspaper* and *Press-Enterprise* were also rejected because there existed a less restrictive way to achieve the goals asserted by the State. In *Globe Newspaper*, the Court pointed out that even when the goal is compelling, if it can be met through an *ad hoc* application of restrictions designed to fit the particular case, rather than generally applicable restrictions, the former must be used. 457 U.S. at 607-08. The same approach was used in *Press-Enterprise* where the State sought to justify closure of the jury selection process by asserting the need to protect the privacy of jurors. Although accepting that juror privacy might in some cases be a compelling interest, the Court pointed out that a case-by-case evaluation of particular requests for privacy was an available means to accomplish the goal. 464 U.S. at 513.

This required use of an *ad hoc* examination of alternatives is not a new concept in cases involving access to information about criminal trials. In *Nebraska Press*, for example, a substantial ground for rejection of the publication restraint was the failure of the trial court to consider trial protective alternatives. 427 U.S. at 563-64; see also *Richmond Newspapers*, 448 U.S. at 580-81.

In sum, there is a consistent pattern in this Court's approach to restrictions on the flow of information to the public about criminal cases. Even when the purpose of the restriction is compelling, broadly worded regulations of general application, which have no empirically demonstrated nexus to the goal, and for which a less restrictive case-specific alternative exists, may not be used.

III. THE SOLE SOCIETAL INTEREST WHICH JUSTIFY LIMITATIONS ON THE DISSEMINATION OF INFORMATION ABOUT CRIMINAL TRIALS IS INTERFERENCE WITH THE FAIRNESS OF THE TRIAL.

The two interests asserted by the profession in support of its regulations on trial publicity are trial fairness and the fiduciary and professional obligations of attorneys as officers of the court. *A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, Recommendations of the Advisory Committee on Fair Trial and Free Press* 80, 82, 92-93 (Tentative Draft 1966) ["Reardon Report"]; *Association of the Bar of the City of New York, Special Committee on Radio, Television and the Administration of Justice, Freedom of the Press and Fair Trial* 24 (Final Report with Recommendations 1967) ["Medina Report"]. Only the first of these considerations can justify professional sanctions on defense attorneys.

A. Protection Of The Fairness Of The Trial Is An Interest Of Compelling Constitutional Magnitude, But Is Not Easily Satisfied.

Guaranteeing a fair trial both for the accused and for the state unquestionably is a societal interest of constitutional magnitude, sufficiently compelling to outweigh even core first amendment interests. It is necessary, however, to carefully identify and describe this interest since all trial publicity is not necessarily harmful. *Nebraska Press, supra*, at 554. The dangers against which the system must be on guard in that "the conclusions . . . reached in a case will be induced . . . by . . . outside influence," *Patterson v. Colorado*, 205 U.S. 454, 462 (1907), that the trial will "be won through the use of the meeting hall, the radio, and the newspaper," *Bridges, supra*, at 271, and "that the jury's verdict be based on . . . outside sources." *Sheppard, supra*, at 351. It is the protection of the legitimacy of the ultimate decision, and

not such broad and nebulous interests as "the due and proper administration of justice," *Medina Report, supra*, at 24, which provides the compelling interest.

Application of sixth amendment standards of jury impartiality suggests that the instances in which trial publicity will invalidate a trial are infrequent if not rare. *Nebraska Press, supra*, at 551. Pretrial publication of the accused's confession is not always sufficient. See, *Stroble v. California*, 343 U.S. 181 (1952). Knowledge by the jury that the accused previously has been convicted of another serious crime is also not necessarily so prejudicial as to destroy impartiality. See, *Murphy v. Florida*, 421 U.S. 794, 801 n.5, 802 (1975). This Court's decisions in the area appear to demand evidence of "a sustained excitement and . . . a strong prejudice among the people," *Murphy, supra*, at 726, that would "so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Nebraska Press, supra*, at 569. This is the standard against which the publicity must be measured and the validity of professional regulations judged where trial protection is the asserted goal.

B. The Fiduciary And Professional Obligations Of Attorneys, Standing Alone, Do Not Constitute A Compelling Governmental Interest.

An individual's status as an attorney, a school teacher, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), a student, *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 511 (1969), or a prison inmate, *Procunier v. Martinez*, 416 U.S. 396, 409 (1974), does not mandate a shedding of expressive rights. The Court has consistently rejected such a "status" justification in cases presenting first amendment activities by attorneys. *NAACP v. Button*, 371 U.S. 415 (1963), for example, rejected the view that the associational activities of attorneys were subject to

greater than normal regulation. Only a specific state interest independent of the attorney's status could justify the imposition of sanctions. A similar result was reached in *In re Primus*, 436 U.S. 412 (1978), requiring a showing of actual harm to justify prohibition and sanctioning of solicitation activities.

Federal and state courts have all consistently concluded that an attorney's status as officer of the court, standing alone, is insufficient to justify sanctions. The United States Courts of Appeal for the Fourth and Seventh Circuits, the Supreme Court of Montana, the Appellate Division of the New York Supreme Court, and a California appellate court have all insisted that some showing of a danger to the fairness of the trial, rather than mere status as an attorney, is necessary to override the first amendment interests in attorney publicity about pending proceedings. *Hirshkop v. Snead*, 594 F.2d 356, 363 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975); *In re Keller*, 693 P.2d 1211 (Mont. 1984); *Markfield v. The Association of the Bar of the City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82, appeal dismissed, 37 N.Y.2d 794, 337 N.E.2d 612, 375 N.Y.S.2d 106 (1975); *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973).

Rejection of a status based justification for suppression of attorney speech is supported by two considerations. First, although an attorney is an officer of the court, his or her role differs considerably from that of other court officers such as marshals, bailiffs and court clerks. Unlike those officers, an attorney is neither the servant nor the employee of the court, *Spevack v. Klein*, 385 U.S. 511, 520 (1967) (Fortas, J., concurring), and has significant professional obligations upon which he or she must make independent judgments. *Cohen v. Hurley*, 366 U.S. 117, 124 (1961).

Second, limiting the description of an attorney to that of assistant to the court in resolving disputes as anti-

thetical to the lawyer's equally important responsibility to ensure the integrity of the judicial system. Attorneys play a major role in protecting society against misconduct in the judicial process, *In re Sawyer, supra*, and are charged with the responsibility to represent the public's interest in integrity during the pendency of legal proceedings. *Gannett Co. v. Pasquale*, 443 U.S. 368, 384 (1979). Any authority residing in the state to silence attorneys, merely because they are attorneys, is inconsistent with those charges and obligations.

IV. PROFESSIONAL ETHICAL REGULATION OF DISCUSSION OF CRIMINAL CASES FAILS ALL THREE PARTS OF THE NARROWLY TAILORED MEANS TEST.

Current professional regulation of defense attorney discussion of pending criminal cases is not justified by even the compelling governmental interest in protecting trial fairness. This is because such regulations are not narrowly tailored to meet that goal. The regulations must be measured against three requirements: precision of regulation; empirically demonstrable nexus; and less restrictive alternative.

A. Professional Regulations Concerning Trial Publicity Are Broadly Worded, Imprecise Generalities Which Do Not Adequately Alert The Attorney Of The Line Between Proscribed And Permitted Discussion.

The threat of professional sanctions and the possible loss of professional standing, professional reputation, and of livelihood are consequences which any attorney would, and should be loath to risk. The compulsion toward silence generated by professional regulations is especially significant because the relinquished privilege is not of particular professional or personal importance to the lawyer, but at the same time, it is a fundamental societal interest. With little to gain, and much at risk, a lawyer confronted

with a broadly worded regulation might "understandably hesitate", *Button, supra*, at 434, before publicizing that which he or she perceived to be an impropriety within the system.

Furthermore, unlike a generally applicable criminal statute, professional regulations are specifically focused on a sharply identified class of citizens. A lawyer participating in a criminal trial is well aware that the rules concerning trial publicity are applicable and that a possible violation will be personally dangerous. This combination of high risk, lack of inclination, and focused application all argue for uniquely precise regulation to protect the public interest.

An examination of the most recent effort by the American Bar Association to draft a publicity regulation, Rule 3.6 of the Model Rules of Professional Conduct, adopted by the Association's House of Delegates in 1983, *see Summary of Action Taken by the House of Delegates of the A.B.A.*, 10-11 (Annual Meeting—August 2-3, 1983), demonstrates that the required precision of regulation simply is not present. That rules provides, in part:

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to . . . a criminal matter . . . and the statement relates to:

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial.

These provisions alert an attorney that he may be subject to discipline for making a statement which refers to a criminal matter, is a statement which a reasonable person would expect to be published by the media and relates information he reasonably should know that, if disclosed, would create a substantial risk of prejudicing an impartial jury; such a statement is grounds for discipline simply because it is deemed that such a statement ordinarily will have a substantial likelihood of prejudicing an adjudicative proceeding. The provision that such a statement "ordinarily" would be sanctionable leaves the burden on the attorney to demonstrate that his statement was made in an extraordinary situation.

Such language hardly provides the attorney with a precise statement of the line between publicity which he has a "special responsibility to exercise fearlessness" in disseminating, *Sawyer, supra*, at 669 (Frankfurter, J., dissenting), and that which may cause his dismissal from the profession. It will be the rare individual who would not choose to err on the side of caution, particularly since silence carries no risk—professional regulations provide no sanction for failure to publicize that which the public has a strong interest in knowing.

B. There Is No Empirically Demonstrable Nexus Between Regulations Proscribing Trial Publicity By Defense Attorneys And The Government's Interest In Fair Trials.

The empirically demonstrable nexus requirement mandates a showing of a real danger that trial publicity by defense attorneys presents a threat to the fairness of criminal trials. In fact, there has never been a case in which defense counsel publicity was found to have interfered with a fair trial.

The Reardon Report, *supra*, upon which the American Bar Association relied in adopting Model Rule 3.6 and its

predecessor DR 7-107 of the Code of Professional Responsibility, cites two cases which it asserts justify regulation of defense attorney trial publicity. In the first, *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1963) (en banc), *cert. denied*, 372 U.S. 978 (1963), the Court of Appeals for the Second Circuit, sitting en banc, concluded that the destruction of trial fairness was caused by improper publicity emanating from the prosecution; the court expressly rejected the state's assertion that publicity by defense counsel had contributed to the constitutional violation. *Id.* at 372. The Reardon Report in its second illustration, *Sheppard v. Ohio*, 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910 (1956), relied upon a quotation from the brief of the State of Ohio accusing defense counsel of using the press to prejudice the State's case. Reardon Report, *supra*, at 42-43. Ten years later, however, when this Court struck down Sheppard's conviction, an extremely meticulous discussion of the facts of the trial and its attendant publicity never mentioned an instance of misconduct by counsel for the defense. *Sheppard v. Maxwell*, *supra*, at 335-49. Indeed, in its final report the Reardon Commission acknowledged that there was no available empirical data to support its conclusions. *A.B.A. Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, Recommendations of the Advisory Committee on Fair Trial and Free Press* 16 (Approved Draft 1968).

The Medina Report, *supra*, cited four additional cases in support of its recommendation of publicity restraints on defense attorneys. One involved a public statement by defense counsel in a kidnapping prosecution that the alleged victim had engineered the kidnapping as a publicity stunt. *Id.* at 43-44. The ineffectiveness of this statement in prejudicing trial fairness is made evident by the fact that all defendants were convicted. *N.Y. Times*, March 8, 1964, at 1, col. 1.

The next case relied upon by the Medina Report is *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74, 114 S.E.2d 421, *cert. denied*, 364 U.S. 290 (1960). See *Medina Report*, *supra*, at 44-45. The issue raised in that case was media involvement in the trial, *Grimes*, *supra*, at 77, 114 S.E.2d at 423, not defense publicity. Although the facts as stated by the Georgia Supreme Court indicate that defense counsel twice made statements to the press, *id.* at 80-81, 114 S.E.2d at 425-26, neither that court nor the trial court appeared concerned in any way with, or perceived the case as involving excessive defense counsel publicity. Indeed, the only suggestion that *Grimes* was a "defense counsel publicity" case appeared in a five page student law review note which the Medina Report quoted considerably more extensively than it did the court's opinion. *Medina Report*, *supra*, at 44-45.

The remaining two illustrations cited by the Medina Report provide even less support for finding defense attorney impropriety. One was an espionage trial, prior to which radio stations had broadcast reports that the accused had been dishonorably discharged from the Air Force. Defense counsel permitted the accused to display his honorable discharge papers to the press, but made no statements himself. *Id.* at 45-46. In the other, defense counsel told the press that he could prove his client's innocence of certain of the charges, that the police were guilty of misconduct, that public officials should be accountable for injustices they commit, and that the accused maintained his innocence. A few days later the charges referred to were dropped. *Id.* at 48-50.

Another study by the American Bar Association Section of Criminal Law into the facts surrounding the trial of Bruno Richard Hauptmann, recommended "[t]hat broadcasting of arguments, giving out at argumentive [sic] press bulletins, and every other form of argument or discussion addressed to the public, by lawyers in the case during the progress of the litigation

be definitely forbidden." *A.B.A. Section of Criminal Law, Report of Special Committee on Publicity In Criminal Trials*, reprinted in Hallam, *Some Object Lessons On Publicity In Criminal Trials*, 24 Minn. L. Rev. 453, 507 (1940). An examination of the facts revealed a typically one sided media campaign by the prosecution team. Nonetheless, while the publicity campaign conducted by the prosecutor was extensive and clearly potentially damaging, *Hallam, supra*, at 501, the Committee apologized to the prosecutor for what it deemed "the necessity for criticism." *Id.* On the other hand, the sole statement made by defense counsel before sequestration of the jury was issued two days after counsel's appointment, was a general advisory comment that our system of law operates with a presumption of innocence, that a mere accusation of guilt is not proof of guilt, and that after a brief examination of the case the attorney was persuaded that his client was innocent. *Id.* at 498. Unlike its treatment of the prosecutor, however, the Committee suggested that it would have been appropriate for defense counsel to apologize for issuing statements to the press. *Id.* Ultimately, the New Jersey Supreme Court concluded that the jury had been adequately protected and consequently the publicity had not distorted the fairness of the trial, *State v. Hauptmann*, 115 N.J.L. 412, 445, 180 A. 809, 828, *cert. denied*, 296 U.S. 649 (1935), a conclusion in which the Committee concurred. *Hallam, supra*, at 479. The eventual execution of the accused suggests that defense counsel's publicity did not so interfere with the fairness of the trial as to deprive the state of its conviction.

In addition to the foregoing reports issued by the organized bar, three substantial studies of the problem of trial publicity have been independently conducted.³ The

³ Two law review articles were also cited by the Reardon Report, Jaffe, *Trial By Newspaper*, 40 N.Y.U. L. Rev. 504 (1965); McCarthy, *Fair Trial And Prejudicial Publicity: A Need For Reform*, 17 Hastings L.J. 79 (1965). *Reardon Report, supra*, at 76 n.212. Both

primary value of these studies is their extensive research into and disclosure of large numbers of high publicity criminal cases. Professor Donald M. Gillmor, in *Free Press and Fair Trial* (1966), discusses close to 100 such cases, but finds only three, in addition to *Bloeth, supra*, and *Sheppard v. Ohio, supra*, in which there was even a claim of defense attorney publicity. Describing the first of these cases, Professor Gillmor states that "[d]efense attorneys, hopeful of a mistrial, were suspected of planting [a] story," reported in the press, that the defendants had offered to plead guilty. *Gillmor, supra*, at 45. No mistrial was granted and the subsequent conviction of five of the defendants was unanimously affirmed by the state supreme court.

Professor Gillmor's next illustration is the case of John Rexinger, who was accused of torture and rape. For nine days after his arrest the press, using information apparently obtained from the police, engaged in overwhelming character assassination. The sole statement by defense counsel was an announcement that the police had the wrong man, which was followed the next day by Rexinger's release and the arrest of another man. *Id.* at 50-54. Finally, Gillmor discusses Burton Abbott, who was charged with kidnapping and murder. Newspapers carried articles reporting statements by the victim's father, the police, the prosecutor and potential prosecution witnesses. After almost a month, defense counsel publicly took note of the circumstantial nature of the evidence—no motive, no weapon, no idea as to how and when the crime had been committed and no proof of the method of abduction. This statement, true or not, clearly had no impact on the outcome of the trial since Abbott was convicted and executed. *Id.* at 54-56.

indicate that the fair trial problem derives either from the release of information by public officials or diligent investigation by reporters. *Jaffe, supra*, at 504; *McCarthy, supra*, at 91. Neither cites an instance in which defense counsel engaged in excessive publicity.

A second study examined the role of the media in the problem of trial publicity, but devotes a section to a discussion of attorney publicity. J. Lofton, *Justice And The Press* (1966). This discussion is devoted almost exclusively to publicity by prosecutor. *Id.* at 218-26. Only a few paragraphs refer to publicity by defense attorneys and disclose no instance in which defense attorney publicity had an impact on the outcome of the litigation. Indeed, the study points out that defense publicity occurs almost exclusively when the defendant has been the target of an attack by police and prosecutors in the press. *Id.* at 225-26.

A third independent examination, A. Friendly & J. Goldfarb, *Crime and Publicity: The Impact of News on the Administration of Justice* (1967), included a review of twenty notorious cases in which publicity was a real or potential difficulty in maintaining a fair trial. In all of these cases publicity by the news media was extensive and the study documents illustrations of publicity by eye witnesses, police officials, prosecutors, coroners, mayors, judges, United States Commissioners, Congressional committees, and even the President of the United States. *Id.* at 15-17, 19, 21-22, 166, 167 n.1, 172, 175-77, 178-79, 181-86, 190-91, 192 n.10. In this careful and detailed examination, however, not a single instance of arguably improper publicity by a defense attorney is cited; the authors recommend that defense counsel be excluded from publicity restrictions. *Id.* at 135-36, 247-48.

An additional category of authorities is a series of four cases in which this Court determined that trial fairness was destroyed by excessive publicity. *Sheppard v. Maxwell, supra*; *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961). Of the four only *Sheppard* even arguably involved defense publicity. Justice Clark's opinion for the Court devoted some thirteen pages to a description of the highlights of the attendant publicity, *Sheppard, supra*, at 337-49, placing substantial emphasis upon improper activities of the police, the Coroner, the

news media, and the actual conduct of the trial. *Id.* at 337-41, 342-49. In contrast, the opinion contains not a single specification of publicity, proper or improper, by defense counsel. Even *Sheppard* then provides no support for the assertion that there is empirical evidence that defense publicity interferes with trial fairness.

Finally, it is instructive to examine those instances in which professional disciplinary bodies concluded that defense attorneys had engaged in publicity which justified sanctions. *In re Sawyer, supra*, involved a defense attorney who was suspended from practice for having made a speech highly critical of the manner in which her client was being tried. This Court reversed the sanctions, holding that nothing said by Sawyer "tend[ed] to obstruct the administration of justice." 360 U.S. at 636; *id.* at 647 (Stewart, J., concurring). *Markfield, supra*, involved suspension proceedings brought against the defense attorney in a criminal trial arising out of a prison riot. The Appellate Division of the Supreme Court of New York struck down the disciplinary action, holding that Markfield's publicity did not constitute an interference with a fair trial. 49 A.D.2d at 517, 370 N.Y.S. at 85. *In re Keller, supra*, also rejected disciplinary action on the ground that the regulatory rule had been applied in a per se manner, with no demonstration that the publicity had impacted upon the trial. 693 P.2d at 1212-14. And in the very case now before the Court, there was a finding by the Nevada State Bar that Petitioner Gentile's statements did not actually interfere with the fairness of the trial.

Not a single instance of trial interference through publicity by a defense attorney has even been documented. The possibility that such publicity will actually conflict with the government interest in assuring trial fairness thus is necessarily a matter of conjecture and speculation, and cannot support an across-the-board interference with the flow of information to the public about pending trials.

C. A Judicial Silence Order, Based On Specific And Identified Facts And Designed To Meet The Fair Trial Demands Of A Particular Case, Is A Less Restrictive Means Of Protecting Trial Fairness From Harmful Extra-Judicial Publicity:

The lack of precision in the language of professional regulations, coupled with the inability to state with certainty that the problem they seek to address—at least with respect of defense counsel—is a real one, increases the importance of the third prong of the closely tailored means test. The strict scrutiny standard of review mandates a preference for restrictions that are limited to particular cases in which a need to protect the trial actually has been demonstrated, and that are carefully designed to withhold only so much information as is necessary to meet that need.

Numerous trial protective techniques exist, such as jury sequestration, change of venue, continuance, searching *voir dire* and cautionary instructions, none of which infringe on First Amendment rights and thus are to be preferred to speech restrictive remedies. *Nebraska Press*, *supra*, at 563-64, 601-03; see *Sheppard* *supra*, at 357-62. Once the jury has been empaneled, and sequestration is possible, there should never be a need for suppression of defense attorney speech to protect trial fairness. There may be a case where, prior to jury selection, none of the stated techniques will be available or sufficient to protect against extra-judicial publicity, even by the defense attorney. Even if such a case were to arise there is still an available alternative—a specifically tailored judicial order prohibiting described publicity.

Such an order would issue only after a judicial officer determined, at an adversarial hearing in which evidence of the nature and extent of existing publicity is presented and appropriate standards are applied, that there was a real need to suppress the information being disseminated by the defense attorney. The trial judge would then be in a position to narrowly tailor an order suppressing only

so much information as is determined necessary to protect the trial, and the attorney would not be left to speculate as to whether continued publicity would later be found to have violated a nebulous standard.

Examination of this Court's precedents on trial publicity suggests a strong preference for this approach. Justice Black, writing for the majority in *Bridges*, *supra*, stated that "an authoritative guide to the permissible scope of comment" was to be favored over imprecise, generalized regulatory techniques. 314 U.S. at 269. Justice Frankfurter, concurring in *Pennekamp*, *supra*, pointed out that "we cannot escape the exercise of judgment on the particular circumstances of the particular case." 328 U.S. at 367 (Frankfurter, J., concurring). In its listing of protective techniques which the trial judge might have used in *Sheppard*, *supra*, the Court stated that "the trial court might well have proscribed extrajudicial statements by any lawyer . . . which divulged prejudicial matters." 384 U.S. at 361. The holdings in both *Globe Newspaper*, *supra* and *Press-Enterprise*, *supra*, turned on this very point. In *Globe Newspaper* a mandatory closure rule was struck down because the governmental goal could have been achieved through a case by case determination of the need for protection. 457 U.S. at 607-08. Similarly, the closure in *Press-Enterprise* was held invalid because of the availability of the alternative of individualized evaluation of the interests asserted. 464 U.S. at 513.

Such an order, of course, could not issue unless a need to protect the trial was established "with the degree of certainty . . . cases on prior restraint require." *Nebraska Press*, *supra*, at 569. This is as it should be, since the first amendment interests in open discussion of criminal cases and the judicial system is great, and any suppression of the transmission of information about these issues is valid only when found clearly necessary. But "[t]he phrase 'prior restraint' is not a selfwielding sword. Nor can it serve as a talismanic test. * * * The generalization that prior restraint is particularly obnoxious in

civil liberty cases must yield to more particularistic analysis." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-42 (1957).

In the context at bar, a narrowly drafted judicial order, devised after an adversarial hearing at which the facts are examined and the line between protected and unprotected speech is carefully determined, and which is subject to immediate appellate review, is more protective of free speech than is a broadly worded rule, sharply focused on specific speakers, the validity of which is not examined until it is too late for the speaker to adapt his comments to the law. While a judicially imposed prior restraint may "freeze" the speech which it prohibits, it also implicitly declares all unrestrained speech to be protected. Professional rules, on the other hand, chill all speech to which they might apply and do not offer a judicial determination until after the process of self-censorship has been completed.

Consequently, an order by the trial court, judiciously used, can provide precisely the "authoritative guide to the permissible scope of comment," *Bridges, supra*, at 269, which properly balances the dual goals of informing the public about the trial and protecting against excessive risk of community bias. In contrast, broadly worded professional rules present an almost insurmountable incentive to all but the most courageous of attorneys to err on the side of silence. Thus, professional rules are not, in fact, a scheme of subsequent punishment but, because of their narrow focus on a particular category of potential speakers who risk professional standing, reputation and livelihood, are a particularly undesirable form of prior censorship. This difficulty is compounded by the generality of language, which forces its target to engage in self-censorship to an extent much greater than that which might be required by "the particular circumstances of the particular case." *Pennekamp, supra*, at 367 (Frankfurter, J., concurring). The precisely drawn prior restraint is likely to "chill" less information than is a

broad professional regulation and thus better serves the twin goals of trial fairness and public oversight of the judicial system.

CONCLUSION

Professional ethical proscriptions on the speech of criminal defense attorneys involved in pending litigation infringe on important first amendment interests, including the recognized right of society to learn about particular trials and the workings of the criminal justice system, the right of attorneys to discuss that system and engage in political speech, and the right of the accused to choose a spokesman in his or her behalf. As such, they can be justified only if they are narrowly drawn to serve, empirically connected to, and the least restrictive means of achieving the compelling interest in fair trials. Currently existing rules satisfy none of these requirements and should be rejected.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

DOMINIC P. GENTILE,

Petitioner,

—v.—

STATE BAR OF NEVADA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF NEVADA

**BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL
LIBERTIES UNION, THE ACLU OF NEVADA,
AND PEOPLE FOR THE AMERICAN WAY,
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI*¹

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan membership corporation with over 275,000 members, dedicated to defending the principles of individual liberty embodied in the Constitution. The ACLU of Nevada is one of its statewide affiliates. Throughout its seventy-year history, the ACLU has been particularly associated with free speech issues and has participated in thousands of cases involving the First Amendment at every level of the state and federal courts. In addition, it has been cognizant that the litigation in which it has been involved often serves as a catalyst for political change and therefore takes on First Amendment significance. Because this case seems to restrict the ability of lawyers to comment on their pending cases and therefore restricts the First Amendment rights of the lawyers, their clients, and public interest organizations that may employ them, the ACLU is presenting its views through this *amicus* brief.

People for the American Way (PFAW) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAW now has over 290,000 members nationwide. PFAW and associated attorneys have been involved in litigation across the country seeking to defend these values, in which the public voices of the attorneys involved have been crucial in helping educate the wider public on important civic and constitutional issues. PFAW files this brief because of the potential significance of this case to these important First Amendment rights.

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

Amici adopt the Statement of Facts as set forth by petitioner.

SUMMARY OF ARGUMENT

The Nevada Supreme Court Rule under which Mr. Gentile was sanctioned is unconstitutional on overbreadth grounds. Public statements by lawyers about public interest cases, which make up a large part of the docket of both state and federal courts, involve matters of public concern within the meaning of this Court's precedents. The Nevada Rule on its face sanctions all public comments by lawyers in all cases, both civil and criminal. Although a narrowly tailored rule might be formulated that would cover comments by lawyers in criminal cases dealing with specific items of evidence, the rule in this case is substantially overbroad in its application to constitutionally protected speech.

Even if the rule were not invalidated on overbreadth grounds, the only time a lawyer can be sanctioned for public comments about a pending case is when his comments actually prejudiced the proceedings; that is, if his statements led to a mistrial or other disruption of a pending matter. Lawyers are not part of a regulated industry in which they give up their First Amendment rights in exchange for the privilege of practicing law.

Finally, the sanction imposed below cannot be upheld because a criminal defense lawyer must have a "right of reply" to public statements surrounding the indictment of his client. Prosecutors often hold press conferences or issue statements about an indictment which frequently create an unfavorable atmosphere concerning the guilt or innocence of a client. A defense lawyer must have the opportunity to respond to such comments in the interest of fair play and due process.

ARGUMENT

I. NEVADA SUPREME COURT RULE 177 UNDER WHICH PETITIONER WAS SANCTIONED SHOULD BE INVALIDATED UNDER THE OVERBREADTH DOCTRINE

A. Lawyers' Speech About Pending Public Interest Cases Is Protected By The First Amendment

This Court does not sit as the final disciplinary body for lawyers admitted in the states who may be sanctioned by their highest state courts. As Justice Brennan explained in *Nix v. Whiteside*, 475 U.S. 157, 176 (1986) (Brennan, J., concurring): "This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics."

However, this Court does have the final say over what the First Amendment means. Thus, if state disciplinary rules are applied against a lawyer for exercising his or her rights under the First Amendment, this Court can, and often has, struck down the discipline imposed, or the rule applied, on First Amendment grounds. See, e.g., *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (state disciplinary rule prohibiting lawyer from soliciting business by sending truthful and nondeceptive letters to potential clients unconstitutional under First and Fourteenth Amendments); *In re R.M.J.*, 455 U.S. 191 (1982) (application of state disciplinary rule against lawyer sending out mailed announcement cards invalid under First Amendment); *In re Primus*, 436 U.S. 412 (1978) (state disciplinary rule against solicitation of clients cannot be applied to ACLU attorney contacting client and offering free legal services for purpose of commencing litigation and advancing civil liberties objectives of ACLU).

Although many of this Court's recent decisions on the subject of attorney discipline deal with the question of a lawyer's commercial free speech rights, this Court has always recognized the close relationship between litigation and the political free speech rights of litigants and their lawyers. The *Primus* case is illustrative. In that case a local ACLU lawyer, Mrs. Edna Smith Primus, contacted a woman, Mrs. Marietta Williams, who had attended a meeting where the lawyer had discussed the legal problems of sterilization and offered to represent sterilized women in suits against the performing doctors. After being advised that Mrs. Williams, one of the women who attended the meeting, was considering such a suit, Mrs. Primus wrote a letter offering her services and those of the ACLU free of charge for bringing such an action. Mrs. Williams then showed the letter to her doctor, who referred the matter to the state grievance committee. The Committee instituted disciplinary proceedings against Mrs. Primus and found her guilty of solicitation under local ethics rules.

This Court reversed. Relying on its earlier decision in *NAACP v. Button*, 371 U.S. 415 (1963), this Court held that the activities of Mrs. Primus in contacting a potential client were protected by the First Amendment. The Court also distinguished *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), where direct person-to-person solicitation for pecuniary gain was involved:

[A]ppellant's act of solicitation took the form of a letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization. This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery.

And her actions were undertaken to express personal political beliefs and to advance the civil liberties objectives of the ACLU, rather than to derive personal gain.

436 U.S. at 422.

Similarly, in *Button* itself, this Court reversed a state court decision finding that the efforts of the NAACP to explain their litigation objectives to potential clients in an effort to advance those objectives by finding prospective plaintiffs could not be sanctioned under the state bar's antisolicitation rules. The Court emphasized that the attempt by the NAACP to advance its civil rights agenda through litigation was protected under the First Amendment: "... the activities of the NAACP, its affiliates and legal staff . . . are modes of expression and association protected by the First Amendment." 371 U.S. at 428-29.

See also *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971)(efforts by labor unions to provide low-cost, effective legal representation to their members protected by the First Amendment right of association and cannot be sanctioned under state ethics regulations); *Brotherhood of Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964)(union program of recommending competent attorneys for injured members protected by First Amendment and cannot be sanctioned by state bar); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967)(hiring attorney on salary basis to represent workers in workers compensation cases protected by First Amendment and cannot be sanctioned by state bar).

If contacting clients and bringing cases to advance the civil liberties agenda of the organizations involved is core political speech, fully protected by the First Amendment, then the act of a civil liberties lawyer in publicly discussing these types of cases is also core political

speech and is also fully protected by the First Amendment. Suppose Mrs. Primus had in fact brought an action on behalf of Mrs. Williams to sue for damages because of her sterilization. Suppose she held a press conference announcing the suit and stating that the efforts of state authorities to sterilize poor women on welfare was a violation of their constitutional right of privacy. Such a public statement to explain the basis and purpose of the suit surely serves an important public policy objective. It may educate the public on how poor women can be improperly pressured to give up their vital reproductive rights, how they can defend themselves legally, and why sterilization is not an appropriate solution to women on welfare.

This Court can take judicial notice of the fact that civil liberties and public interest organizations of every type who file *pro bono* litigation frequently announce the purpose of their suits in press conferences, in order to explain their objectives to others in society who may then coordinate those legal efforts with political actions seeking to advance the same objectives.² Public comments by lawyers about their pending public interest cases must therefore be held to be core political speech.

² A cursory computer check on NEXIS shows that there were at least 275 newstories from 1989 to the present involving comments to the press by lawyers. These included comments by lawyers on many significant cases involving the public interest. See, e.g. Washington Post, August 1, 1990 (story on obscenity trial of 2 Live Crew); San Francisco Chronicle, September 21, 1990 (story on consumer suit brought against insurance companies); Los Angeles Times, September 21, 1990 (story on new surrogate mother case).

B. Since Nevada Supreme Court Rule 177 Could Cover Protected Political Comment By Lawyers In Public Interest Litigation, It Must Be Declared Invalid Under The Overbreadth Doctrine

As obvious as the proposition advanced in the prior section may be, it has crucial significance in this case. The Nevada Supreme Court Rule at issue here is not limited to public comment by a lawyer in pending criminal proceedings involving only his client and the evidence in the case. It covers comments by all lawyers in all proceedings. Rule 177 reads in part:

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to . . . a criminal matter . . . and the statement relates to:
 - a. the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness.
 -
 - d. any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that would result in incarceration;
3. Notwithstanding subsection 1 and 2 (a-f), a lawyer involved in the investigation or litiga-

tion of a matter may state without elaboration:

- a. the general nature of the claim and defense;
- b. the information contained in a public record;
- c. that the investigation of the matter is in progress

A number of comments are necessary about the Rule:

1. On its face, the operative language in ¶1 applies to all litigation, both civil and criminal. Paragraph 2 is simply a special definitional section dealing with specific comments in a criminal proceeding. If ¶1 is found invalid, then the other operative sections dependent on it must also fall.

2. Because ¶1 covers all litigation, it presumptively includes public interest litigation such as that described in the *Primus* and *NAACP v. Button* cases, which are fully protected by the First Amendment as core political action. Thus, in the hypothetical given above, if Mrs. Primus described what evidence she proposed to offer in the case (including such matters as expert testimony that would tend to show how poor women on welfare are exploited and pressured to give up their rights), she presumably could run afoul of the rule.³ Likewise, if the

³ We put aside the vagueness problem in determining what type of public comment by a lawyer in a civil case "will have a substantial likelihood of materially prejudicing an adjudicative procedure." Among the definitional problems that have to be faced are the questions whether the standard is different if the case is tried to a court rather than a jury; how does an ethics committee determine whether prejudice could occur if no trial is ever held; is the "substantial likelihood" standard equivalent to a "clear and present danger test" or a "serious (continued...)"

NAACP lawyers in the *Button* case brought an action to invalidate the Virginia laws on segregation and discussed specific evidence they proposed to introduce in such a case, presumably they could also have been sanctioned under a rule similar to that in force in Nevada.

3. Criminal actions may also implicate core First Amendment activities. To cite just a few recent examples, the public was extremely interested in obscenity charges brought against the rap group "2 Live Crew" in Florida last summer-because of the sale of one of their albums. Similar charges of obscenity were filed against the museum director of the Cincinnati Contemporary Art Center, Dennis Barrie, for displaying photographs by Robert Mapplethorpe in his museum. The charges implicated serious public interest matters about the scope of the obscenity laws, the range of popular culture, and the nature of photographic art. The lawyers involved in these types of cases could and should feel free to contribute to the public discussion of those issues.⁴

4. As discussed below in Point III, a prosecutor is free under the rule to say whatever he wants in a press conference about the indictment which he prepared (since that is "information in a public record" which is excluded from the rule's coverage by ¶3(b)). But a lawyer responding to a prosecutor's public comments on the indictment would be guilty of violating the rule if he

³ (...continued)
and imminent threat" test or is there a difference between them. See, e.g., *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975).

⁴ As noted below, the comments made by Mr. Gentile and for which he was sanctioned involved accusations of criminal behavior against a police officer, which by definition involved a matter of public concern within the meaning of this Court's precedents. See *Connick v. Myers*, 461 U.S. 138 (1983); see also *Breuer v. Hart*, 909 F.2d 1035 (7th Cir. 1990)(any statement about wrongdoing or breach of public trust by public employee was matter of public concern).

maintained his client's innocence.

Thus, the potential exists for Nevada Rule 177, which is based on ABA Model Rule of Professional Conduct 3.6, to be used to sanction core political expression; i.e., public comments by public interest lawyers about litigation implicating and advancing the "civil liberties objectives" of their organizations. Even if it were possible to draft a specific, narrow rule to cover public comments by criminal defense lawyers about the evidence in a case, the application of the type of broad rule at issue in this case, that could cover such an important and wide-ranging amount of protected speech, runs afoul of the overbreadth doctrine.

This Court explained in *Gooding v. Wilson*, 405 U.S. 518 (1972):

It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute [T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity" This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Id. at 520-21 (citations omitted).

It is true that the overbreadth doctrine applies only if the overbreadth aspects covering speech are "substantial," *New York v. Ferber*, 458 U.S. 747, 769 (1982), and that the doctrine does not apply in the commercial free

speech area, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. at 478. But neither of those limitations apply here. The overbreadth of Nevada Rule 177 is clearly substantial, since public interest litigation and cases raising issues of "public concern" are an enormous part of the docket in both the state and federal courts.³ Comments by lawyers about these cases cannot be considered insignificant. Furthermore, as this Court's decision in *Primus* makes clear, these cases do not invoke the right of commercial free speech but rather involve core political expression.

Nevada Rule 177 must therefore be invalidated on overbreadth grounds.

II. LAWYERS' SPEECH ABOUT PENDING LITIGATION IS PROTECTED BY THE FIRST AMENDMENT AND CANNOT BE SANCTIONED UNLESS A COURT FINDS THROUGH CLEAR AND CONVINCING EVIDENCE THAT THE COMMENTS DID IN FACT PREJUDICE THE PROCEEDINGS

Even if the overbreadth doctrine was not applied to strike down Nevada Rule 177 in its entirety, the rule cannot be interpreted as broadly as the lower court did in this case. Its only legitimate application must be in cases where a court found that an adjudicative proceeding was in fact undermined by a lawyer's out-of-court prejudicial comment. That is, if a mistrial were in fact declared or a proceeding overturned because of something a lawyer said that violated a properly drafted rule,

³ As an illustration, according to the 1989 Annual Report of the Administrative Office of the United States Courts, the largest category of civil litigation in the federal courts is in the civil rights field (other than actions for recovery of overpayments and enforcement of judgments). See Table C2, Table of Civil Cases, Commenced by Basis of Jurisdiction and Nature of Suit.

then and only then could any sanction be applied.

At the outset we must take issue with the position outlined in the Solicitor General's *amicus* brief on the Petition for *Certiorari*. The Solicitor General suggests that lawyers are part of a regulated industry that does not enjoy the same rights as the rest of American society. "A lawyer has a professional obligation not to make comments that appear reasonably likely to endanger the fairness of his client's trial. *A lawyer is not in the same position as [a] private citizen with respect to the judicial system.*" Brief for the United States as *Amicus Curiae* at 5-6 (emphasis added).

According to the Solicitor General, the state may extract a renunciation of First Amendment rights from a lawyer as a condition of giving him a license to practice law:

By virtue of the status conferred on him by the State, a lawyer often enjoys special access to information about a case The State . . . can lawfully condition the lawyer's right to practice law on his exercise of responsible restraint in using the information that comes to him by dint of his state-conferred license.

Id. at 7. Both of these points are demonstrably wrong and require response.

In the first place, the legal profession is not a regulated industry in the same sense as the liquor or gun industry. Lawyers are private entrepreneurs who serve a vital public function, often by contending against the very state that licensed them. As this Court observed in *Cammer v. United States*, 350 U.S. 399, 405 (1956):

It has been stated many times that lawyers are "officers of the court" [But] nothing that was said in *Ex parte Garland* or in any

other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business.

In view of the fact that public interest litigation is often a necessary catalyst for, and instrument of, political activity (as explained above), the lawyer engaged in that litigation should have more, rather than less, scope for expressing himself in public. The idea that the person with the greatest knowledge of the subject at hand, which is often the people's business in the highest sense, should be least able to discuss it goes against every principle of the First Amendment. One purpose of the First Amendment is to arrive at the truth through the free marketplace of ideas. *E.g.*, *Abrams v. United States*, 250 U.S. 616 (1919). It follows that any restraint on the expression of that information by persons most knowledgeable can only be justified by an extremely important governmental counterinterest. (We discuss below the circumstances when an actual subversion of the legal process by a lawyer can justify sanctions.) But to say that the granting of a license to practice law alone justifies such restraint is unsupportable.

There is another reason why the Solicitor's position cannot be sustained. This Court has established that the state cannot impose "unconstitutional conditions" upon the grant of any benefit. *See Western and Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648, 657 (1981) ("this Court has . . . held that a State may not impose unconstitutional conditions on the grant of a privilege"). The basis for that rule was explained in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972):

For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech. For if the government could deny the benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

See also *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare payments cannot be conditioned on waiver of right to travel); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation); *Speiser v. Randall*, 357 U.S. 513 (1958) (tax exemption), or *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (bar admission).

The state may no more condition the grant of the license to practice law on the demand that a lawyer not join a political party or go to church than it can on the demand that he give up his right to free speech.

What follows from this discussion is that the only circumstances under which a lawyer can be sanctioned for public comment about a matter in which he appears is when he violates a direct order not to comment on a case or reveal specific information, or when his comments do in fact subvert the process; *i.e.*, a mistrial is declared, a jury cannot be convened because of prejudicial publicity generated by the lawyer, or a case is overturned on appeal because of such comment. Such a rule is necessary as a corollary to the recognition that lawyers play a vital First Amendment role in this society and that their knowledge of a case is often crucial to under-

standing the public policy implications of the matter. That knowledge should be shared with others who may wish to act on the matter in the political sphere.

Weighed against that right is the state's interest in the fair administration of justice. But only when the state's interest is actually undermined can sanctions be imposed. That rule has the virtue of adequate definition and easy application. The current rule requiring that a "lawyer . . . reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding" contains distorted syntax, hypothetical conditions and imprecise predictions.

The Solicitor General attacks the "actual prejudice" principle on the ground that it would undermine the possibility of disciplining an "unethical" lawyer if a proceeding were "fortuitous[ly]" aborted; *i.e.*, for reasons not related to the lawyer's conduct. "Under such a regime, the deterrent impact and uniform application of disciplinary rules regulating extrajudicial comments would be seriously undermined." Brief of the Solicitor General at 12. But the government's position begs the question. The argument reduces itself to the claim that ethics committees should be free to discipline a lawyer for making public comments because they want to make it easy to impose such sanctions without the need for showing prejudice. It simply states the result without giving any reasons for it. By contrast, an actual prejudice rule would achieve clarity and uniformity without undermining the important First Amendment values implicated by any direct ban on lawyers' speech.

III. A CRIMINAL LAWYER SHOULD BE ALLOWED A RIGHT TO REPLY TO PUBLIC COMMENTS BY A PROSECUTOR ABOUT AN INDICTMENT

Even if the Nevada Rule were not invalidated on overbreadth grounds and even if the rule could be applied without a showing of actual prejudice, there is something totally unfair and improper about the manner in which it is applied in this type of case.

Mr. Gentile was disciplined for making public comments about the innocence of his client one day after enormous publicity had been generated by the prosecutors' office through the arraignment of his client for larceny and narcotics possession.

As noted above, under the applicable rules (Nevada Rule 177, §3(b)), prosecutors are allowed to make public comments to the press about "the information contained in a public record." Since an indictment is a "public record," prosecutors may read every word of the indictment -- which they drafted -- to the press without worrying about the application of the disciplinary rules.

In fact, it is a regular practice for prosecutors, both state and federal, to hold elaborate press conferences to announce an indictment, particularly of public officials, such as that involved in this case. A brief computer survey through NEXIS shows that there were 92 news-stories in the past two years containing the words "prosecutor," "press conference," and "indictment." Included are the following:

Chicago Tribune, December 20, 1990; report on indictment of political figures in Chicago; "Whatever type of corruption you wanted, you could get," U.S. Att'y Fred Foreman said in announcing Wednesday's indictments. 'And this movable feast went from the 1st Ward to Springfield, to City Hall, to the Cir-

cuit Court of Cook County (and) the highest levels of the Chancery Court."

Washington Times, January 19, 1990; "U.S. Attorney Jay B. Stephens . . . said in a press conference immediately after the arraignment of D.C. Mayor Marion Barry on a drug possession charge that it was a 'personal tragedy for the defendant in this case, but the narcotics abuse is also a personal tragedy for many in this city.'"

Los Angeles Times, April 22, 1989; report on indictment of prominent businessman for narcotics possession; "Immediately after the arraignment, prosecutors called a press conference to release the indictment . . . U.S. Attorney William Braniff said the case illustrates the growing role people with power and status in the financial community are playing in the world of narcotics trafficking. 'I believe the indictment points out the potential danger that exists when members of society with influence in financial affairs offer their services, in this case to the underworld, for any illicit purposes they want,' Braniff said."

The Attorney General of the United States is a frequent participant in press conferences or press statements that report on indictments of federal offenders. For example:

Los Angeles Times, October 26, 1990; report of indictment of former S&L owner; "The indictment was announced at a press conference here by Att'y Gen. Dick Thornburgh and Marvin Collins, the U.S. Attorney in Dallas. Western Savings was seized by federal regulators in September, 1986, and

Thornburgh said its losses are expected to cost taxpayers in excess of \$1 billion. Thornburgh called Woods 'one of the biggest savings and loan bandits in Texas.'"

Newsday, July 26, 1990; report on indictment of Eastern Airlines for failure to maintain proper safety records. "In a statement released by his office in Washington, U.S. Attorney General Dick Thornburgh said the alleged conspiracy 'strikes a raw nerve in anyone who has ever boarded an airplane.'"

To say to this Court that a defense lawyer violates the lawyer disciplinary rules when he responds to the massive publicity surrounding an indictment of a public official or a public figure -- which the prosecutors are free to read to the last word -- defies every principle of fair play.

In numerous areas of the law, a person is privileged to respond to accusations or comments made by others even though he or she might be sanctioned for making the comment without such a provocation. See, e.g., *United States v. Young*, 470 U.S. 1, 11 (1985)(discussing right of response by prosecutor to improper argument made by defense counsel); *Lawn v. United States*, 355 U.S. 339, 359-60 (1958)(discussing "invited reply" doctrine in criminal trial); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)(discussing fairness doctrine and personal attack under FCC rules); *Buckley v. Vidal*, 327 F.Supp. 1051 (S.D.N.Y. 1971)(discussing qualified privilege and self-defense doctrine in libel law).

Whatever might be the proper scope for gag rules on lawyers relating to a pending case, the rule must take into account the need to respond to the massive publicity surrounding an indictment of a public official or prominent individual, which is totally under the control of prosecutors. As explained above, prosecutors can and

do hold press conferences which explain the indictment and often go beyond the four corners of the instrument. There must at the least be a qualified privilege for defense attorneys to respond to such publicity.

In this case, it is undisputed that Mr. Gentile's comments were made in response to the publicity surrounding the arrest and arraignment of his client. Subsequent events, including the acquittal of his client, supported the accuracy of what he said. Sanctions were totally inappropriate under the circumstances.

CONCLUSION

For the reasons stated above, the decision below should be reversed.

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No. 89-1836

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DOMINIC P. GENTILE,

Petitioner

v.

STATE BAR OF NEVADA,

Respondent

ON WRIT OF CERTIORARI TO THE
NEVADA SUPREME COURT

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE
- IN SUPPORT OF RESPONDENT**

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DOMINIC P. GENTILE,

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STATE BAR OF NEVADA,

*Respondent*ON WRIT OF CERTIORARI TO THE
NEVADA SUPREME COURT**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT****THE INTEREST OF THE AMICUS CURIAE**

Goal V of the American Bar Association ("ABA") is "To Assure the Highest Standards of Professional Competence and Ethical Conduct." Its efforts to achieve that goal have earned the ABA recognition as a leader in the development and promotion of ethical standards for the legal profession. It promulgated the Canons of Ethics in 1908; The Model Code of Professional Responsibility in 1969; and the Model Rules of Professional Conduct in 1983. Presently the Model Rules have been adopted with amendments in thirty-five states and the District of Columbia; have been recommended to the highest courts of three other states for adoption; and are presently under active study in three additional jurisdictions.

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Rule 177 adopted by the Nevada Supreme Court is identical to Rule 3.6 of the Model Rules of Professional Conduct.¹ The ABA submits that these Rules strike a balance between important First and Sixth Amendment rights. This Court's decision on the constitutionality of Nevada Rule 177 will profoundly impact the standards governing extrajudicial statements by lawyers, with consequent effects upon the administration of justice. The ABA is therefore vitally interested in the issues presented in this case.²

SUMMARY OF ARGUMENT

NEVADA DISCIPLINARY RULE 177 IS CONSTITUTIONAL ON ITS FACE AND BALANCES LEGITIMATE INTERESTS IN FREE SPEECH AND FAIR TRIAL. AS OFFICERS OF THE COURT, LAWYERS HAVE TRADITIONALLY BEEN SUBJECT TO LIMITATIONS UPON THEIR FIRST AMENDMENT RIGHTS NOT APPLICABLE TO OTHER PERSONS. THE RULE AT ISSUE IS NEITHER VAGUE NOR OVERBROAD AND PROPERLY ARTICULATES THE BOUNDARIES OF ACCEPTABLE EXTRAJUDICIAL STATEMENTS BY LAWYERS.

ARGUMENT

I. A LAWYER'S ROLE AS OFFICER OF THE COURT AND DIRECT PARTICIPANT IN A JUDICIAL PROCEEDING PROPERLY SUBJECTS THE LAWYER TO RESTRICTIONS UPON THE

¹ Rule 3.6 has been adopted unchanged by 18 states, and with minor changes by 12 states. In 5 states and in the District of Columbia, it was adopted with substantial revision.

² The ABA limits its argument to the facial constitutionality of the Rule at issue. It takes no position on the application of the Rule to the particular facts of this case.

EXERCISE OF THE FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

A. Traditional ethical obligations of lawyers as officers of the court impose a variety of limitations upon lawyers' First Amendment rights not applicable to other persons.

The essential role of the lawyer in the administration of justice carries with it unique obligations that do not apply to other citizens. *Theard v. United States*, 354 U.S. 278, 281 (1957); *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) (Cardozo, C.J.). One such traditional obligation imposes upon the lawyer certain restrictions upon the freedom to speak (or not to speak) under the First Amendment to the United States Constitution. This Court has acknowledged the existence and appropriateness of such restrictions. In *In re Sawyer*, this Court stated that "[O]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *In Re Sawyer*, 360 U.S. 622, 646 (1959). Addressing lawyers' relinquishment of certain rights as members of a regulated profession and as officers of the court, this Court stated in *In re Snyder*, 472 U.S. 634, 644-645 (1985), that "[t]he license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice."

The states have similarly acknowledged this principle. For example, in *In re Woodward*, 300 S.W.2d 385, 393-394, (Mo. 1957), the court held that "[a] layman may, perhaps, pursue his theories of free speech . . . until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics." See also *In re Frerichs*, 238 N.W.2d 764 (Iowa 1976) (lawyer,

acting in a professional capacity, may have fewer rights of free speech than would a private citizen); *In re Johnson*, 240 Kan. 334, 729 P.2d 1175, 1179 (1986) (one of the purposes of disciplinary action is to enforce "honorable conduct on the part of the court's own officers.")

In order to fully appreciate the lawyer's special duties with respect to extrajudicial statements it is useful to consider certain parallel restrictions imposed upon the lawyer that also restrict the lawyer's first amendment rights. Understanding the lawyer's special obligations as an officer of the court where such other restrictions apply sheds helpful light on the rationale that underlies Nevada Rule 177.

A lawyer's first amendments rights are limited, for example, when the lawyer is obligated to maintain the confidentiality of information revealed by a client. Such restriction serves to instill confidence in the lawyer-client relationship, and to insure candid disclosures to lawyers by their clients, thereby insuring the proper administration of justice by affording the lawyer the opportunity to remonstrate with the client who may intend wrongdoing.

Lawyers' speech rights are also limited by traditional conflict-of-interest provisions that prohibit a lawyer from undertaking representations adverse to those of the lawyer's present or former clients, thereby guaranteeing zealous advocacy and instilling in clients a sense of the loyalty of their lawyers, without which the justice system could not function.

Lawyers' freedom of speech is further restricted by the traditional prohibition against acting as witnesses in their clients' behalf, so as to not subject themselves to possible impeachment and thereby undermine the effectiveness of the representation they provide.

In addition, lawyers' speech is restricted by traditional prohibitions against contact with jurors both during and after an adjudicative proceeding, a measure developed to assure the finality of verdicts and to protect jurors from potential harassment.

Finally as this Court's line of recent cases on the subject of lawyer advertising reveals, limitations of lawyers' first amendment speech rights in that context may be appropriately tailored to protect the public from coercion, harassment and duress. *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988), *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

All of these limitations arise out of a lawyer's role as advocate and officer of the court, and are thus predicated on a difference between the lawyer, *qua* lawyer, and other persons, such as members of the press. All of these restrictions are directed toward the proper functioning of the judicial system.

B. A rule prohibiting extrajudicial statements having a substantial likelihood of materially prejudicing the outcome of an adjudicative proceeding is a legitimate restriction upon lawyers' first amendment rights, carefully tailored to protect systemic values in the administration of justice.

A rule prohibiting a lawyer from making extrajudicial statements that have a substantial likelihood of materially prejudicing the outcome of an adjudicative proceeding is designed to assure the proper functioning of the judicial system by insuring fair trials. The special obligation imposed upon lawyers in this context, as distinct from other parties, to assist the justice system in insuring the fair outcome of an adjudicative proceeding by complying with rules that limit their extrajudicial statements is constitutional.

The special restriction imposed by rules such as Nevada Rule 177 upon a lawyer's extrajudicial speech, preventing the lawyer from becoming the actual source of prejudicial statements, is justified by at least two principles. The first of these is that the special training a lawyer possesses enables the lawyer to better understand the implications of certain speech for the eventual outcome of a proceeding. It would be an anomaly in the law of professional responsibility for the ethical rules governing lawyer conduct to hold that a lawyer having full understanding of the harms inherent in certain types of extrajudicial statements should nonetheless be authorized to be the initiator of those harms.

The second principle supporting the obligation imposed upon lawyers in this arena of speech is that the special privilege granted to them to obtain or discover otherwise unavailable information meant for use at trial carries with it a concomitant duty not to misuse such information to prejudice the outcome of a proceeding. To liberalize the restrictions on the use of the discovery process would necessarily result in a need to foreclose the process entirely. This danger was discussed in *In re Halkin*, 598 F.2d 176, 194, n. 42 (D.C. Cir. 1979), where the court noted that

prejudice to a fair trial is not the only danger posed by unfettered dissemination of discovery materials. Inevitably, the possibility of dissemination will lessen (to some degree) judges' willingness to order liberal discovery, and inhibit willing compliance with discovery requests. To maximize the full flow of discovery would require nothing short of a blanket prohibition on disclosure. . . . such a rule would clearly cut too deeply into First Amendment freedoms . . .

The ABA further submits that consideration of the constitutional challenge to Nevada Rule 177 should not, however, focus narrowly or exclusively upon the fair outcome of a trial, as though this were the sole value to be weighed against a lawyer's right of free speech. An argument that lawyers cannot be subjected to restrictions greater than those imposed upon members of the press or parties not directly involved in an adjudicative proceeding fails to take into account the lawyer's special status and ignores the body of law establishing the wide variety of obligations that attend such status. The state's amply recognized need to preserve certain fundamental or systemic values within the justice system requires a different analysis of the problem.

Scrutiny of limitations on lawyer speech, in a context broader than that of trial outcome alone, is exemplified in *U.S. v. Simon*, 664 F.Supp. 780, 789, (S.D.N.Y. 1987), *affirmed sub nom. Application of Dow Jones & Co., Inc.*, 842 F.2d 603 (2d Cir.), *cert. denied sub nom. Dow Jones & Co., Inc. v. Simon*, U.S. 946 (1988), where members of the communications media had applied to vacate an order restraining pretrial statements by defense lawyers and prosecutors. There the court stated that "[I]n addition to its constitutional responsibility in protecting the right to a fair trial on the part of individual defendants, the Court must also concern itself with protecting systemic values considered indispensable to the fair administration of justice." The ABA submits that this Court should scrutinize Nevada Rule 177, its objective and effect, in a similar manner.

II. The Historical Development of the Rule at Issue Here Reflects the Careful Balancing of Competing State Interests and Results in an Ethical Rule That Legitimately Safeguards Critical Values of the System for Administering Justice.

The development of limitations of speech in this area have traditionally been the responsibility of the bar. Although the propriety of extrajudicial statements by lawyers was addressed as early as 1908 in Canon 20 of the ABA's Canons of Ethics, it is in the last quarter-century that such statements have been addressed by a series of rules developed in the context of this Court's holdings on the subject of the permissibility of limitations on first amendment rights. The history of the development of these most recent rules, when set alongside a chronology of this Court's decisions on the subject, provides help in understanding why Rule 3.6, from which Nevada Rule 177 is derived, constitutes a legitimate restriction on lawyer speech.

The formulation of Rule 3.6 derives from the recommendations of the Advisory Committee on Fair Trial and Free Press ("Advisory Committee"), created in 1964 by the ABA upon the recommendation of the Warren Commission, the commission appointed to investigate the assassination of President Kennedy. The Warren Commission's report on the assassination concluded with the recommendation that

representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial.

Report of the Warren Commission, quoted in Ainsworth, "Fair Trial-Free Press," 45 F.R.D. 417 (1966).

The group of prominent lawyers and judges who served on the Advisory Committee developed the ABA *Standards Relating to Fair Trial and Free Press* ("Fair Trial — Free

Press Standards"), the first comprehensive guidelines relating to disclosure of information concerning criminal proceedings. As was later reported to the ABA by the Standing Committee on Association Communications, the study was supported by field surveys and consultations with news media organizations and law enforcement officials. The Standards defined what had never been defined before: the specific types of nonprejudicial information that could be released for publication to meet the requirements of press freedom and inform the public, and the types of information that should not be released if prejudice is to be avoided in subsequent trials.

These standards were relied upon by the ABA in 1968 in formulating the Model Code of Professional Responsibility rule relating to extrajudicial statements by lawyers. The rule barred lawyers' extrajudicial comments, in criminal cases, that were "reasonably likely to interfere with a fair trial." DR 7-107(D). The need for and appropriateness of such a rule had been emphatically identified by this Court two years earlier in *Sheppard v. Maxwell*, 384 U.S. 333, 362-363 (1966):

Due process requires that the accused receive a trial by an impartial jury free from outside influence. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity . . . The Courts must take such

steps by rule and regulation that will protect their processes from prejudicial outside influences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

At the time of the ABA's actions, the Federal judiciary was also studying the issue of what measures might be taken by the federal courts to meet the problem of prejudicial publicity in connection with criminal cases. In 1966, the Judicial Conference of the United States authorized a Special Subcommittee to Implement *Sheppard v. Maxwell* to proceed, under the aegis of the Committee on the Operation of the Jury System, with a study of the necessity of promulgating guidelines or taking other corrective action to shield federal juries from prejudicial publicity. See *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 404-407 (1968) ("Kaufman Report").

While the Kaufman Report's recommendations were more liberal than those of the ABA Advisory Committee with respect to the press, its recommendations about public discussion by attorneys in pending criminal cases were identical to the Advisory Committee standards. Ainsworth, "Fair Trial-Free Press," 45 F.R.D. 417, 425. The Kaufman Report specifically relied upon and quoted *Sheppard v. Maxwell* for authority in proscribing these statements. District courts, responding to the recommendations of the Kaufman Report, proceeded to enact local rules incorporating these standards.

The "reasonable likelihood" of prejudicing a fair trial test was thus used by a majority of courts, state and federal, in the years following *Sheppard*.³

Ten years after the Advisory Committee Report, the Fair Trial-Free Press Standards were amended, and the "reasonable likelihood" test was changed to a "clear and present

³ See, e.g., *United States v. Tijerina*, 412 F.2d 661, 666-67 (4th Cir.), cert. denied, 396 U.S. 990 (1969); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976); *United States v. Simon*, 664 F. Supp. 780, 791 (S.D.N.Y. 1987) (endorsing the "reasonable likelihood" test as "more realistic" than a "clear and present danger" or "serious and imminent threat" test), aff'd sub nom. *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, cert. denied sub nom. *Dow Jones & Co., Inc. v. Simon*, 488 U.S. 946 (1988); *Society of Professional Journalists v. Martin*, 431 F. Supp. 1182, 1188-89 (D.S.C.) (approving "reasonable likelihood" standard although finding, on the facts, a "substantial likelihood" of prejudice to fair trial rights), aff'd as modified on other grounds, 556 F.2d 706 (4th Cir. 1977), cert. denied, 434 U.S. 1022 (1978); *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); *National Broadcasting Co., Inc. v. Cooperman*, 116 A.D.2d 287, 292, 501 N.Y.S.2d 405, 408 (2d Dept. 1986) ("reasonable likelihood" of a "serious threat to a defendant's right to a fair trial"). See also *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979); *In re Russell*, 726 F.2d 1007, 1009-11 (4th Cir.), cert. denied, 469 U.S. 837 (1984); *Application of National Broadcasting Company, Inc.*, 635 F.2d 945, 951 (2d Cir. 1980); Association of the Bar of the City of New York, *Report of the Ad Hoc Committee on Pre-trial Publicity* at 5 (April 1987). But cf. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

danger" test. Standard 8-1.1, (as amended, 1978) (2d ed. 1980 Supp. 1986). The change "assign[ed] greater weight to the attorney's right under the first amendment to make public, extrajudicial statements about criminal investigations or litigation. [It] was prompted by a consideration of several judicial decisions, the most noteworthy of which is *Chicago Council of Lawyers v. Bauer*." *ABA Standards for Criminal Justice*, at 8-5 (2d ed. 1980).

When the Model Rules of Professional Conduct were drafted in the early 1980's, the drafters did not go as far as the revised Fair Trial-Free Press Standards in giving precedence to the lawyer's right to make extrajudicial statements when fair trial rights are implicated. While acknowledging the recently amended Fair Trial-Free Press Standard, and *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), the drafters stopped short adopting the "clear and present danger" test and endorsed instead a "substantial likelihood of material prejudice" as the appropriate test. The drafters felt that the "substantial likelihood test," rather than the "clear and present danger" test, struck the proper balance between fair trial and lawyers' free speech. The ABA submits that this balanced standard, contained in Rule 3.6, withstands constitutional scrutiny.

III. Alternative Means of Protecting Against the Harm of Prejudicial Extrajudicial Statements of Lawyers are Less Effective and Desirable Than Is The Rule at Issue Here.

The prohibitions imposed by a rule such as Nevada Rule 177 have been characterized as more restrictive than alternative methods that might be available to address and remedy the harm done by prejudicial extrajudicial statements of lawyers. However, alternative methods of repairing such harm suffer from several shortcomings: they are triggered

only after potentially harmful conduct has occurred, but do not prevent it; they impose significant administrative, financial and practical burdens upon the judicial system; and they are unlikely to be an effective means of eradicating the harms they address. These methods include changing trial venue, sequestering jury members, conducting individual voir dire of the jury venire, and instructing jurors to disregard inadmissible evidence contained in extrajudicial statements.

Each of these methods is likely to be inadequate. A change of trial venue, given the complexity and current cost of trials, imposes an enormous and unnecessary burden upon the judicial system and incurs increased costs and inconvenience to parties, witnesses and counsel. Sequestering of jurors not only incurs substantial additional costs, but significantly limits the pool of those available to serve, as well. Reliance upon jury voir dire and court instructions to the jury does not protect against the significant risk that extensive amounts of pretrial publicity, intended to influence the jury, will result in decisions relying, even if subconsciously, on inadmissible evidence. And even where the actual fairness of the outcome of the trial has not been prejudiced, as perhaps evidenced by the acquittal of a defendant, the interest in the apparent fairness of the judicial system requires sensitivity to the threat to a defendant's reputation that may linger even after acquittal.

Evidencing its concern about such a threat, the Court in *U.S. v. Simon*, noted

For example, following his acquittal, Labor Secretary Donovan asked rhetorically where he might go to have his reputation restored to him. . . . Under circumstances similar to those confronted by Mr. Donovan, lingering notions about an acquitted defendant's character, and even his innocence may

remain embedded in the public's memory. Apart from the impact these notions may have upon an acquitted defendant's life, employment prospects and stature in the community, such residual effects help to undermine public confidence in the judicial system.

U.S. v. Simon, 664 F.Supp. at 789.

The ABA submits that the proper administration of justice and the state interest in assuring the fair outcome of judicial proceedings are better served by requiring that lawyers adhere to a rule that provides an effective deterrent to specific harms rather than, through lack of regulation, resorting to measures to undo those harms after they occur and disciplining lawyers who were responsible for creating them.

IV. Model Rule 3.6 and Nevada Rule 177 Are Neither Vague Nor Overbroad and Provide Clear Instruction to Lawyers Contemplating Extrajudicial Statements.

The Nevada Rule identifies types of information, in language familiar to the lawyers to whom it is addressed, which, if publicly disseminated prior to trial, have a substantial likelihood of materially prejudicing an adjudicative proceeding. The Rule has three components, each of which provides guidance to lawyers who contemplate making extrajudicial statements.

The first component identifies two elements that must be present before any extrajudicial statement is proscribed: the statement must be substantially likely to create prejudice, and that prejudice must be material.

The second component of the Rule identifies categories of information that would ordinarily have a substantial likelihood of materially prejudicing the outcome of a judicial proceeding. These examples alert the lawyer to the subject matter of extrajudicial statements that trigger concern.

The third component of the Rule identifies categories of information that a lawyer may publicly disclose, in short, a "safe harbor" provision. That, too, provides guidance by identifying statements that will not subject the lawyer to disciplinary action.

The need for a rule of this sort was addressed by the court in *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 250, stating that

... specific rules are also necessary in order to avoid vagueness. The rules furnish the context necessary to determine what may constitute a "serious and imminent threat" of interference with the fair administration of justice.

CONCLUSION

The American Bar Association respectfully submits that the Rule in question is facially constitutional.

Respectfully submitted,

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